



# FEDERAL ACQUISITION CIRCULAR

December 30, 1991

Number 90-10

Federal Acquisition Circular (FAC) 90-10 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 90-10 is effective *December 30, 1991, except for Item II, Removal of Toshiba Sanctions, which is effective December 29, 1991.*



# **FAC 90-10 LIST of SUBJECTS**

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## **FAC 90-10 SUMMARY of ITEMS**

Federal Acquisition Circular (FAC) 90-10 amends the Federal Acquisition Regulation (FAR) as specified below:

### **Item I—Increase in Cost or Pricing Data Threshold (FAR Case 91-53)**

This interim rule amends FAR subparts 14.2, 15.8, and 52.2 to increase the threshold for submission of certified cost or pricing data from \$100,000 to \$500,000 for contracts awarded by the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard pursuant to the requirements of section 803 of Public Law 101-510. The statutory threshold applicable to contracts awarded by other agencies remains at \$100,000.

*Replacement pages:* 14-3 and 14-4, Table of Contents, Part 15 (pp. 1&2), 15-19 through 15-26.1, 15-31 through 15-34, 52-37 through 52-40, and 52-47 through 52-50.

### **Item II—Removal of Toshiba Sanctions (FAR Case 91-66)**

Subpart 25.10, Sanctions for Violations of Export Controls, the provision at 52.225-12, Notice of Restrictions on Contracting with Sanctioned Persons, and the clause at 52.225-13, Restrictions on Contracting with Sanctioned Persons, are being deleted, in their entirety, from the regulation because the sanctions imposed by Executive Order 12661 dated December 27, 1988, expire on December 28, 1991. Therefore, the regulatory policy contained in the subpart, provision, and clause no longer applies.

*Replacement pages:* Structure of the FAR to the Subpart Level (pp. 3&4), Table of Contents, Part 25, 25-13, Table of Contents, Part 52 (pp. 3-6), 52-117 through 52-122, and 52-321 and 52-322.

### **Item III—Alternative Dispute Resolution (FAR Case 91-62)**

This interim rule revises FAR Subpart 33.2 and section 52.233-1 to add policy, guidance, and criteria for use of alternative dispute resolution techniques.

*Replacement pages:* Table of Contents, Part 33, 33-5 through 33-8, and 52-189 and 52-190



## **FAC 90-10 FILING INSTRUCTIONS**

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clear statement of any special contract requirements that are not included in Section I, Contract clauses, or in other sections of the uniform contract format.

#### 14.201-3 Part II—Contract clauses.

*Section I, Contract clauses.* The contracting officer shall include in this section the clauses required by law or by this regulation and any additional clauses expected to apply to any resulting contract, if these clauses are not required to be included in any other section of the uniform contract format.

#### 14.201-4 Part III—Documents, exhibits, and other attachments.

*Section J, List of documents, exhibits, and other attachments.* The contracting officer shall list the title, date, and number of pages for each attached document.

#### 14.201-5 Part IV—Representations and instructions.

The contracting officer shall prepare the representations and instructions as follows:

(a) *Section K, Representations, certifications, and other statements of bidders.* Include in this section those solicitation provisions that require representations, certifications, or the submission of other information by bidders.

(b) *Section L, Instructions, conditions, and notices to bidders.* Insert in this section solicitation provisions and other information and instructions not required elsewhere to guide bidders. Invitations shall include the time and place for bid openings, and shall advise bidders that bids will be evaluated without discussions (see 52.214-10 and, for construction contracts, 52.214-19).

(c) *Section M, Evaluation factors for award.* Identify the price related factors other than the bid price that will be considered in evaluating bids and awarding the contract. See 14.201-8.

#### 14.201-6 Solicitation provisions.

(a) The provisions prescribed in this subsection are limited to subjects that are general in nature, do not come under other subject areas of the FAR, and pertain to the preparation and submission of bids.

(b) The contracting officer shall insert in all invitations for bids the provisions at—

(1) 52.214-1, Solicitation Definitions—Sealed Bidding;

(2) 52.214-2, Type of Business Organization—Sealed Bidding;

(3) 52.214-3, Amendments to Invitations for Bids; and

(4) 52.214-4, False Statements in Bids.

(c) The contracting officer shall insert the following provisions in invitations for bids:

(1) 52.214-5, Submission of Bids.

(2) 52.214-6, Explanation to Prospective Bidders.

(3) 52.214-7, Late Submissions, Modifications, and Withdrawals of Bids, for solicitations issued in the

United States and Canada for submission of bids to a contracting office in the United States or Canada.

(4) 52.214-32, Late Submissions, Modifications, and Withdrawals of Bids (Overseas), for solicitations under which bids are to be submitted to a contracting office outside the United States or Canada.

(d) Reserved.

(e) The contracting officer shall insert in invitations for bids, except those for construction, the provisions at—

(1) 52.214-9, Failure to Submit Bid; and

(2) 52.214-10, Contract Award—Sealed Bidding.

(f) The contracting officer shall insert in invitations for bids to which the uniform contract format applies, the provision at 52.214-12, Preparation of Bids.

(g)(1) The contracting officer shall insert the provision at 52.214-13, Telegraphic Bids, in invitations for bids if the contracting officer decides to authorize telegraphic bids.

(2) The contracting officer shall insert the basic provision with its Alternate I in invitations for bids that are for perishable subsistence, and when the contracting officer considers that offerors will be unwilling to provide acceptance periods long enough to allow written confirmation.

(h) The contracting officer shall insert the provision at 52.214-14, Place of Performance—Sealed Bidding, in invitations for bids except those in which the place of performance is specified by the Government.

(i) The contracting officer shall insert the provision at 52.214-15, Period for Acceptance of Bids, in invitations for bids (IFB's) that are not issued on SF 33 or SF 1447 except IFB's (1) for construction work or (2) in which the Government specifies a minimum acceptance period.

(j) The contracting officer shall insert the provision at 52.214-16, Minimum Bid Acceptance Period, in invitations for bids, except for construction, if the contracting officer determines that a minimum acceptance period must be specified.

(k) The contracting officer shall insert the provision at 52.214-17, Affiliated Bidders, in invitations for bids if the contracting officer determines that disclosure of affiliated bidders is necessary to prevent practices prejudicial to full and open competition, such as improper multiple bidding.

(l) The contracting officer shall insert the provision at 52.214-18, Preparation of Bids—Construction, in invitations for bids for construction work.

(m) The contracting officer shall insert the provision at 52.214-19, Contract Award—Sealed Bidding—Construction, in all invitations for bids for construction work.

(n) Use of the provision at 52.215-4, Notice of Possible Standardization, may be appropriate in invitations for bids involving supplies that are likely to become standardized. See 15.407(b) regarding use of this provision in sealed bidding.

(o)(1) The contracting officer shall insert the provision at 52.214-20, Bid Samples, in invitations for bids if bid samples are required.

(2) If it appears that the conditions in 14.202-4(f)(1) will apply and the contracting officer anticipates granting waivers thereunder and—

(i) If the nature of the required product *does not* necessitate limiting the grant of a waiver to a product produced at the same plant in which the product previously acquired or tested was produced, the contracting officer shall use the provision with its Alternate I; or

(ii) If the nature of the required product necessitates limiting the grant of a waiver to a product produced at the same plant in which the product previously acquired or tested was produced, the contracting officer shall use the provision with its Alternate II.

(3) See 14.202-4(f)(2) regarding waiving the requirement for all bidders.

(p)(1) The contracting officer shall insert the provision at 52.214-21, Descriptive Literature, in invitations for bids if (i) descriptive literature is required to evaluate the technical acceptability of an offered product and (ii) the required information will not be readily available unless it is submitted by bidders.

(2) Use the basic clause with its Alternate I if the possibility exists that the contracting officer may waive the requirement for furnishing descriptive literature for a bidder offering a previously supplied product that meets specification requirements of the current solicitation.

(3) See 14.202-5(e)(2) regarding waiving the requirement for all bidders.

(q) The contracting officer shall insert the provision at 52.214-22, Evaluation of Bids for Multiple Awards, in invitations for bids if the contracting officer determines that multiple awards might be made if doing so is economically advantageous to the Government.

(r) The contracting officer shall insert the provision at 52.214-23, Late Submissions, Modifications, and Withdrawals of Technical Proposals under Two-Step Sealed Bidding, in solicitations for technical proposals in step one of two-step sealed bidding issued in the United States and Canada for submission of technical proposals to a contracting office in the United States or Canada.

(s) The contracting officer shall insert the provision at 52.214-24, Multiple Technical Proposals, in solicitations for technical proposals in step one of two-step sealed bidding if the contracting officer permits the submission of multiple technical proposals.

(t) The contracting officer shall insert the provision at 52.214-25, Step Two of Two-Step Sealed Bidding, in invitations for bids issued under step two of two-step sealed bidding.

(u) The contracting officer shall insert the provision at 52.214-30, Annual Representations and Certifications—Sealed Bidding, in invitations for bids if annual representations and certifications are used (see 14.213).

(v) The contracting officer shall insert the provision at 52.214-33, Late Submissions, Modifications, and Withdrawals of Technical Proposals under Two-Step Sealed

Bidding (Overseas), in solicitations for technical proposals in step one of two-step sealed bidding under which technical proposals are to be submitted to a contracting office outside the United States or Canada.

(w) The contracting officer shall insert the provision at 52.214-31, Facsimile Bids, in solicitations if facsimile bids are authorized (see 14.202-7).

(x) The provision at 52.214-34, Submission of Offers in the English Language, may be included in solicitations not subject to the Trade Agreements Act (see 25.407(d)) when the contracting officer decides that it is necessary.

(y) The provision at 52.214-35, Submission of Offers in U.S. Currency, may be included in solicitations not subject to the Trade Agreements Act (see 25.407(d)) when the contracting officer decides that it is necessary.

#### 14.201-7 Contract clauses.

(a) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-26, Audit—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, is expected to exceed \$500,000.

(b)(1) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-27, Price Reduction for Defective Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, is expected to exceed \$500,000.

(2) In exceptional cases, the head of the contracting activity may waive the requirement for inclusion of the clause in a contract with a foreign government or agency of that government. The authorizations for the waiver and the reasons for granting it shall be in writing.

(c)(1) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-28, Subcontractor Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, is expected to exceed \$500,000.

(2) In exceptional cases, the head of the contracting activity may waive the requirement for inclusion of the clause in a contract with a foreign government or agency of that government. The authorizations for the waiver and the reasons for granting it shall be in writing.

(d) When contracting by sealed bidding the contracting officer shall insert the clause at 52.214-29, Order of Precedence—Sealed Bidding, in solicitations and contracts to which the uniform contract format applies.

#### 14.201-8 Price related factors.

The factors set forth in paragraphs (a) through (e) below may be applicable in evaluation of bids for award and shall



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## PART 15—CONTRACTING BY NEGOTIATION

15.804-1

These projections may include rates for labor, indirect costs, material obsolescence and usage, spare parts provisioning, and material handling.

"Forward pricing rate recommendation" means a rate set unilaterally by the administrative contracting officer for use by the Government in negotiations or other contract actions when forward pricing rate agreement negotiations have not been completed or when the contractor will not agree to a forward pricing rate agreement.

"Price," as used in this subpart, means cost plus any fee or profit applicable to the contract type.

"Price analysis" means the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit.

"Technical analysis," as used in this subpart, means the examination and evaluation by personnel having specialized knowledge, skills, experience, or capability in engineering, science, or management of proposed quantities and kinds of materials, labor, processes, special tooling, facilities, and associated factors set forth in a proposal in order to determine and report on the need for and reasonableness of the proposed resources assuming reasonable economy and efficiency.

**15.802 Policy.**

(a) 10 U.S.C. 2306a and 41 U.S.C. 254(d) provide that all executive agencies shall require a prime contractor or any subcontractor to submit and certify cost or pricing data under certain circumstances. The Acts also require inclusion of contract clauses that provide for reduction of the contract price by any significant amounts that such price was increased because of submission of contractor or subcontractor defective cost or pricing data.

(b) Contracting officers shall—

(1) Purchase supplies and services from responsible sources at fair and reasonable prices;

(2) Price each contract separately and independently and not (i) use proposed price reductions under other contracts as an evaluation factor or (ii) consider losses or profits realized or anticipated under other contracts; and

(3) Not include in a contract price any amount for a specified contingency to the extent that the contract provides for price adjustment based upon the occurrence of that contingency.

**15.803 General.**

(a) Since information from sources other than an offeror's or contractor's records may significantly affect the Government's negotiating position, Government personnel shall not disclose to an offeror or contractor any conclusions, recommendations, or portions of administrative contracting officer or auditor reports regarding the offeror's or contractor's proposal without the concurrence of the contracting officer responsible for negotiation. This prohibition

does not preclude disclosing discrepancies or mistakes of fact (such as duplications, omissions, and errors in computation) contained in the cost or pricing data supporting the proposal.

(b) Before issuing a solicitation, the contracting officer shall (when it is feasible to do so) develop an estimate of the proper price level or value of the supplies or services to be purchased. Estimates can range from simple budgetary estimates to complex estimates based on inspection of the product itself and review of such items as drawings, specifications, and prior data.

(c) Price negotiation is intended to permit the contracting officer and the offeror to agree on a fair and reasonable price. Price negotiation does not require that agreement be reached on every element of cost. Reasonable compromises may be necessary, and it may not be possible to negotiate a price that is in accord with all the contributing specialists' opinions or with the contracting officer's prenegotiation objective. The contracting officer is responsible for exercising the requisite judgment and is solely responsible for the final pricing decision. The recommendations and counsel of contributing specialists, including auditors, are advisory only. However, the contracting officer should include comments in the price negotiation memorandum when significant audit or other specialist recommendations are not adopted.

(d) The contracting officer's primary concern is the price the Government actually pays; the contractor's eventual cost and profit or fee should be a secondary concern. The contracting officer's objective is to negotiate a contract of a type and with a price providing the contractor the greatest incentive for efficient and economical performance. The negotiation of a contract type and a price are related and should be considered together with the issues of risk and uncertainty to the contractor and the Government. Therefore, the contracting officer should not become preoccupied with any single element and should balance the contract type, cost, and profit or fee negotiated to achieve a total result and price fair and reasonable to both the Government and the contractor. If, however, the contractor insists on a price or demands a profit or fee that the contracting officer considers unreasonable and the contracting officer has taken all authorized actions (including determining the feasibility of developing an alternative source) without success, the contracting officer shall then refer the contract action to higher authority. Disposition of the action by higher authority should be documented.

**15.804 Cost or pricing data.****15.804-1 General.**

(a) Cost or pricing data submitted by an offeror or contractor enable the Government to perform cost or price analysis and ultimately enable the Government and the contractor to negotiate fair and reasonable prices. Cost or

pricing data may be submitted actually or by specific identification in writing.

(b) The Armed Services Procurement Manual for Contract Pricing (ASPM No. 1) was issued by the Department of Defense to guide pricing and negotiating personnel. It provides detailed discussions and examples applying pricing policies to pricing problems. ASPM No. 1 is available for use for instruction and professional guidance. However, it is not directive, and its references to Department of Defense forms and regulations should be considered informational only. Copies of ASPM No. 1 (Stock No. 008-000-00221-5) may be purchased from the Superintendent of Documents, Attn: Mail List Section, U.S. Government Printing Office, Washington, DC 20402.

#### 15.804-2 Requiring certified cost or pricing data.

(a)(1) Except as provided in 15.804-3, certified cost or pricing data are required before accomplishing any of the following actions:

(i) The award of any negotiated contract (except for undefinitized actions such as letter contracts) expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, for contracts awarded after December 5, 1990, expected to exceed \$500,000.

(ii) The modification of any sealed bid or negotiated contract (whether or not cost or pricing data were initially required) when the modification involves a price adjustment expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, for modifications of any sealed bid or negotiated contract awarded after December 5, 1990 (whether or not cost or pricing data were initially required), when the modification involves a price adjustment expected to exceed \$500,000. (For example, a \$30,000 modification resulting from a reduction of \$70,000 and an increase of \$40,000 is a pricing adjustment exceeding \$100,000, and a \$150,000 modification resulting from a reduction of \$350,000 and an increase of \$200,000 is a pricing adjustment exceeding \$500,000.) This requirement does not apply when unrelated and separately priced changes for which cost or pricing data would not otherwise be required are included for administrative convenience in the same modification.

(iii) The award of a subcontract at any tier, if the contractor and each higher tier subcontractor have been required to furnish certified cost or pricing data, when the subcontract is expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, for subcontracts awarded under prime contracts awarded after December 5, 1990, when the subcontract is expected to exceed \$500,000. (But see

15.804-3(i).)

(iv) The modification of any subcontract covered by subdivision (a)(1)(iii) of this subsection, when the price adjustment (see subdivision (a)(1)(ii) of this subsection) is expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, for subcontracts awarded under prime contracts awarded after December 5, 1990, when the modification involves a price adjustment expected to exceed \$500,000.

(2) The contracting officer may obtain certified cost or pricing data for pricing actions below the pertinent threshold in subparagraph (a)(1) of this subsection provided the action exceeds the small purchase limitation. For such pricing actions, the instances in which certified cost or pricing data and inclusion of defective pricing clauses would be justified should be few; however, the contracting officer shall give special consideration to requiring certified cost or pricing data for such pricing actions if the offeror, contractor, or subcontractor—

(i) Has been the subject of recent or recurring, and significant findings of defective pricing;

(ii) Currently has significant deficiencies in its cost estimating systems; or

(iii) Has recently been indicted for, convicted of, or the subject of an administrative or judicial finding of fraud regarding its cost estimating systems or cost accounting practices.

The contracting officer shall document the file to justify the requirement for cost or pricing data not required by regulation. The documentation shall include the contracting officer's written finding that certified cost or pricing data are necessary, the facts supporting that finding, and the approval of the finding at a level above the contracting officer.

(3) The contracting officer shall not require certified cost or pricing data when awarding a contract below the small purchase limitation at 13.000.

(4) When certified cost or pricing data are not required, the contracting officer may request partial or limited data to determine a reasonable price (see 15.804-6(a)(2)).

(b) When certified cost or pricing data are required, the contracting officer shall require the contractor or prospective contractor to submit to the contracting officer (and to have any subcontractor or prospective subcontractor submit to the prime contractor or appropriate subcontractor tier) the following in support of any proposal:

(1) The cost or pricing data.

(2) A certificate of current cost or pricing data, in the format specified in 15.804-4, certifying that to the best of its knowledge and belief, the cost or pricing data were accurate, complete, and current as of the date of final agreement on price.

(c) The requirements of this section also apply to con-

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tracts entered into by the head of an agency on behalf of a foreign government.

### 15.804-3 Exemptions from or waiver of submission of certified cost or pricing data.

(a) *General.* Except as provided in paragraphs (b) and (c) below, the contracting officer shall not require submission or certification of cost or pricing data when the contracting officer determines that prices are—

- (1) Based on adequate price competition (see paragraph (b) below);
- (2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public (see paragraph (c) below); or
- (3) Set by law or regulation (see paragraph (d) below).

(b) *Adequate price competition.* (1) Price competition exists if—

- (i) Offers are solicited;
- (ii) Two or more responsible offerors that can satisfy the Government's requirements submit priced offers responsive to the solicitation's expressed requirements; and
- (iii) These offerors compete independently for a contract to be awarded to the responsible offeror submitting the lowest evaluated price.

(2) If price competition exists, the contracting officer shall presume that it is adequate unless—

- (i) The solicitation is made under conditions that unreasonably deny to one or more known and qualified offerors an opportunity to compete;
- (ii) The low offeror has such a decided advantage that it is practically immune from competition; or
- (iii) There is a finding, supported by a statement of the facts and approved at a level above the contracting officer, that the lowest price is unreasonable.

(3) A price is "based on" adequate price competition if it results directly from price competition or if price analysis alone clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or substantially the same items purchased in comparable quantities, terms, and conditions under contracts that resulted from adequate price competition.

(c) *Established catalog or market prices.* A proposal is exempt from the requirement for submission of certified cost or pricing data if the prices are, or are based on, established catalog or established market prices of commercial items sold in substantial quantities to the general public. In order to qualify for this exemption, the terms of the proposed purchase, such as quantity and delivery requirements, should be sufficiently similar to those of the commercial sales that the catalog or market price will be fair and reasonable.

(1) "Established catalog prices" must be recorded in

a form regularly maintained by the manufacturer or vendor. This form may be a catalog, price list, schedule, or other verifiable and established record. The record must (i) be published or otherwise available for customer inspection and (ii) state current or last sales price to a significant number of buyers constituting the general public (see subparagraph (5) below).

(2) "Established market prices" are current prices that (i) are established in the course of ordinary and usual trade between buyers and sellers free to bargain and (ii) can be substantiated by data from sources independent of the manufacturer or vendor.

(3) "Commercial items" are supplies or services regularly used for other than Government purposes and sold or traded to the general public in the course of normal business operations.

(4) An item is "sold in substantial quantities" only when the quantities regularly sold are sufficient to constitute a real commercial market. Nominal quantities, such as models, samples, prototypes, or experimental units, do not meet this requirement. For services to be sold in substantial quantities, they must be customarily provided by the offeror, using personnel regularly employed and equipment (if any is necessary) regularly maintained solely or principally to provide the services.

(5) The "general public" is a significant number of buyers other than the Government or affiliates of the offeror; the item involved must not be for Government end use. For the purpose of this subsection 15.804-3, items acquired for "Government end use" include items acquired for foreign military sales.

(6) A price is "based on" a catalog or market price only if the item being purchased is sufficiently similar to the catalog- or market-priced commercial item to ensure that any difference in prices can be identified and justified without resort to cost analysis.

(7) If an item is substantially similar to a commercial item for which there is an established catalog or market price at which substantial quantities are sold to the general public, but the price proposed is not *based on* this catalog or market price (see subparagraph (6) above), the contracting officer may, if doing so will result in a fair and reasonable price, limit any requirement for cost or pricing data to those data that pertain to the differences between the items. When the difference between the catalog or market price of an item or items and the proposed total contract price exceeds the pertinent threshold set forth at 15.804-2(a)(1), the contracting officer shall require submission of certified cost or pricing data to identify and justify that difference unless an exemption or waiver is granted.

(8) Even though there is an established catalog or market price of commercial items sold in substantial quantities to the general public, the contracting officer may require cost or pricing data if (i) the contracting

officer makes a written finding that the price is not reasonable, including the facts upon which the finding is based, and (ii) the finding is approved at a level above the contracting officer.

(d) *Prices set by law or regulation.* A price set by law or regulation is exempt from the requirement for submission of certified cost or pricing data. Pronouncements in the form of periodic rulings, reviews, or similar actions of a governmental body, or embodied in the laws, are sufficient to establish the price.

(e) *Claiming and granting exemption.* To receive an exemption under paragraph (c) or (d) of this subsection, the offeror must ordinarily claim it on Standard Form 1412, Claim for Exemption from Submission of Certified Cost or Pricing Data, when the total proposed amount exceeds the pertinent threshold set forth at 15.804-2(a)(1), and more than one catalog item for which an exemption is claimed exceeds \$50,000. When an exemption is claimed for more than one item in a proposal, a separate SF 1412 is required for each item exceeding \$50,000 except as otherwise provided in the solicitation. The contracting officer may grant an exemption and need not require the submission of SF 1412 when—

(1) The Government has acted favorably on an exemption claim for the same item or similar items within the past year. In that case, except as otherwise directed by the contracting officer, the offeror may furnish a copy of the prior claim and related Government action. The offeror must also submit a statement to the effect that to its knowledge since the prior submission, except as expressly set forth in the statement, there have been no changes in the catalog price or discounts, volume of actual sales, or the ratio of sales for Government end use to sales in other categories which would cause a cumulative change in price exceeding \$25,000;

(2) Special arrangements for the submission of exemption claims have been made in anticipation of repetitive acquisitions of catalog items; or

(3) There is evidence, before solicitation, that the item has an acceptable established catalog or market price or a price set by law or regulation. Evidence may include (i) recent submissions by offerors or (ii) the contracting officer's knowledge of market conditions, prevailing prices, or sources.

(f) *Verification.* (1) When a prospective contractor requests exemption from submission of certified cost or pricing data, the contracting officer shall ensure that applicable criteria in either paragraph (c) or (d) above, as appropriate, are satisfied before issuing the exemption.

(2) SF 1412 lists three categories of sales related to the established catalog price of a commercial item sold in substantial quantities to the general public: A, Sales to the U.S. Government or to contractors for U.S. Government use; B, Sales at catalog price to the general public; and C, Sales to the general public at other than

catalog price. Although "substantial quantities" cannot be precisely defined (see subparagraph (c)(4) above), the following guidelines are provided for determining whether exemption claims submitted under the catalog price provision of SF 1412 meet the "substantial quantities" criterion:

(i) Sales to the general public are normally regarded as substantial if (A) Category B and C sales are not negligible in themselves and comprise at least 55 percent of total sales of the item and (B) Category B sales comprise at least 75 percent of the total of Category B and C sales.

(ii) Sales to the general public are rarely considered substantial enough to grant an exemption if (A) Category B and C sales comprise less than 35 percent of total sales of the item or (B) Category B sales comprise less than 55 percent of the total of Category B and C sales.

(iii) When percentages fall between those above, the contracting officer should analyze the individual situation in order to determine whether or not an exemption is justified.

(3) The contracting officer may verify or obtain verification (including audit or contract administration assistance) of the submitted data pertaining to catalog or market prices or prices set by law or regulation. Access to the prospective contractor's records is limited to access to the facts bearing directly on the exemption claimed. It does not extend to cost, profit, or other data relevant solely to the reasonableness of the catalog or proposed price.

(g) *Individual or class exemptions.* The chief of the contracting office may authorize individual or class exemptions for exceptional cases when the contracting officer recommends that an exemption should be made, even though the case does not strictly meet all the criteria for catalog- or market-price exemption. The quantity and prices of actual commercial sales compared with prices offered to the Government, and price relationships as influenced by prevailing trade practices, are the important factors for consideration. The Government's need and the prospective contractor's resistance are not appropriate considerations.

(h) *Price analysis.* Even though an item qualifies for exemption from the requirement for submission of certified cost or pricing data, the contracting officer shall make a price analysis to determine the reasonableness of the price and any need for further negotiation. Unless information is available from Government sources, it may be necessary to obtain from the prospective contractor information such as that regarding—

(1) The supplier's marketing system (e.g., use of jobbers, brokers, sales agencies, or distributors);

(2) The services normally provided commercial purchasers (e.g., engineering, financing, or advertising or

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promotion);

(3) Normal quantity per order; and

(4) Annual volume of sales to largest customers.

(i) *Waiver for exceptional cases.* The agency head (or, if the contract is with a foreign government or agency, the head of the contracting activity) may, in exceptional cases, waive the requirement for submission of certified cost or pricing data. The authorization for the waiver and the reasons for granting it shall be in writing. The agency head may delegate this authority. When the agency head or designee has waived the requirement for submission of certified cost or pricing data, the contractor or higher-tier subcontractor to whom the waiver relates shall be considered as having been required to make available cost or pricing data for purposes of 15.804-2(a)(1)(iii). Consequently, award of any lower-tier subcontract expected to exceed the pertinent threshold set forth at 15.804-2(a)(1) requires the submission of certified cost or pricing data unless exempt or waived under this subsection 15.804-3.

#### 15.804-4 Certificate of Current Cost or Pricing Data.

(a) When certified cost or pricing data are required under 15.804-2, the contracting officer shall require the contractor to execute a Certificate of Current Cost or Pricing Data, shown below, and shall include the executed certificate in the contract file. The certificate states that the cost or pricing data are accurate, complete, and current as of the date the contractor and the Government agreed on a price. Only one certificate shall be required; the contractor shall submit it as soon as practicable after price agreement is reached.

#### CERTIFICATE OF CURRENT COST OR PRICING DATA

This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in section 15.801 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15.804-2) submitted, either actually or by specific identification in writing, to the contracting officer or to the contracting officer's representative in support of .....\* are accurate, complete, and current as of .....\*\*. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

Firm \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

Date of execution\*\*\* \_\_\_\_\_

\* Identify the proposal, quotation, request for price adjustment, or other submission involved, giving the appropriate identifying number (e.g., RFP No. ).

\*\* Insert the day, month, and year when price negotiations were concluded and price agreement was reached.

\*\*\* Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

(End of certificate)

(b) The certificate does not constitute a representation as to the accuracy of the contractor's judgment on the estimate of future costs or projections. It does apply to the data upon which the judgment or estimate was based. This distinction between fact and judgment should be clearly understood. If the contractor had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the contractor's responsibility is not limited by any lack of personal knowledge of the information on the part of its negotiators.

(c) Closing or cutoff dates should be included as part of the data submitted with the proposal. Certain data may not be reasonably available before normal periodic closing dates (e.g., actual indirect costs). Before agreement on price, the contractor shall update all data as of the latest dates for which information is reasonably available. Data within the contractor's or a subcontractor's organization on matters significant to contractor management and to the Government will be treated as reasonably available. What is significant depends upon the circumstances of each acquisition.

(d) Possession of a Certificate of Current Cost or Pricing Data is not a substitute for examining and analyzing the contractor's proposal.

(e) Even though the solicitation may have requested cost or pricing data, the contracting officer shall not require a Certificate of Current Cost or Pricing Data when the resulting award is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation (see 15.804-3(a) through (d)).

(f) The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data were used does not require recertification.

(g) Contracting officers shall not require certification at the time of agreement for data supplied in support of forward pricing rate agreements (see 15.809) or other advance agreements. When a forward pricing rate agreement or other advance agreement is used in partial support of a later contractual action that requires a certificate, the price proposal certificate shall cover (1) the data originally supplied to support the forward pricing rate agreement or other advance agreement and (2) all data required to update the price proposal to the time of agreement on contract price.

(h) Negotiated final pricing actions (such as termination settlements and total final price agreements for fixed-price incentive and redeterminable contracts) are contract modi-

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fications requiring certified cost or pricing data if (1) the total final price agreement for such settlements or agreements exceeds the pertinent threshold set forth at 15.804-2(a)(1) or (2) the partial termination settlement plus the estimate to complete the continued portion of the contract exceeds the pertinent threshold set forth at 15.804-2(a)(1) (see 49.105(c)(15)).

## 15.804-5 Reserved.

## 15.804-6 Submission of data.

(a)(1) The contracting officer shall specify (i) whether or not cost or pricing data are required, (ii) whether or not certification will be required, and (iii) the form (see paragraph (b) of this subsection) in which the cost or pricing data shall be submitted. Even if the solicitation does not so specify, however, the contracting officer is not precluded from requesting such data if they are later found necessary.

(2) When certified cost or pricing data are not required because an action is below the pertinent threshold set forth at 15.804-2(a)(1), the contracting officer

may request partial or limited data to determine a reasonable price. The contracting officer shall request only that data which the contracting officer considers necessary to determine a reasonable price. For example, cost data might be necessary to support an analysis of material costs, but not for labor and overhead costs. When such partial or limited data are requested, the contracting officer should require, as a minimum, the submission of information on the prices and quantities at which the offeror has previously sold the same or similar products.

(b)(1) Cost or pricing data shall be submitted on Standard Form 1411 (SF 1411), Contract Pricing Proposal Cover Sheet, unless required to be submitted on one of the termination forms specified in Subpart 49.6. Data supporting forward pricing rate agreements or final indirect cost proposals shall be submitted in a format acceptable to the contracting officer.

(2) Contract pricing proposals submitted on SF 1411 with supporting attachments shall be prepared to satisfy the instructions and appropriate format of Table 15-2.

**TABLE 15-2 INSTRUCTIONS FOR SUBMISSION OF A CONTRACT PRICING PROPOSAL**

1. SF 1411 provides a vehicle for the offeror to submit to the Government a pricing proposal of estimated and/or incurred costs by contract line item with supporting information, adequately cross-referenced, suitable for detailed analysis. A cost-element breakdown, using the applicable format prescribed in 7A, B, or C below, shall be attached for each proposed line item and must reflect any specific requirements established by the contracting officer. Supporting breakdowns must be furnished for each cost element, consistent with offeror's cost accounting system.

When more than one contract line item is proposed, summary total amounts covering all line items must be furnished for each cost element. If agreement has been reached with Government representatives on use of forward pricing rates/factors, identify the agreement, include a copy, and describe its nature. Depending on offeror's system, breakdowns shall be provided for the following basic elements of cost, as applicable:

**Materials**—Provide a consolidated priced summary of individual material quantities included in the various tasks, orders, or contract line items being proposed and the basis for pricing (vendor quotes, invoice prices, etc.). Include raw materials, parts, components, assemblies, and services to be produced or performed by others. For all items proposed, identify the item and show the source, quantity, and price.

**Competitive Methods**—For those acquisitions (e.g., subcontracts, purchase orders, material orders, etc.) exceeding the pertinent threshold set forth at 15.804-2(a)(1) priced on a competitive basis, also provide data showing degree of competition, and the basis for establishing the source and reasonableness of price. For interorganizational transfers priced at other than cost of the comparable competitive commercial work of the division, subsidiary, or affiliate of the contractor, explain the pricing method (see 31.205-26(e)).

**Established Catalog or Market Prices/Prices Set by Law or Regulation**—When an exemption from the requirement to submit cost or pricing data is claimed, whether the item was produced by others or by the offeror, provide justification for the exemption as required by 15.804-3(e).

**Noncompetitive Methods**—For those acquisitions (e.g., subcontracts, purchase orders, material orders, etc.) exceeding the pertinent threshold set forth at 15.804-2(a)(1) priced on a noncompetitive basis, also provide data showing the basis for establishing source and reasonableness of price. For standard commercial items fabricated by the offeror that are generally stocked in inventory, provide a separate cost breakdown if priced based on cost. For interorganizational transfers priced at cost, provide a separate breakdown of cost by elements. As required by 15.806-2(a), provide a copy of cost or pricing data submitted by the prospective source in support of each subcontract, or purchase order that is either: (i) \$1,000,000 or more, or (ii) both more than the pertinent threshold set forth in 15.804-2(a)(1)(iii) and (iv) and more than 10 percent of the prime contractor's proposed price. The contracting officer may require submission of cost or pricing data in support of proposals in lower amounts. Submit the results of the analysis of the prospective source's proposal as required by 15.806. When the submission of a prospective source's cost or pricing data is required as described above, it shall be included as part of the offeror's initial pricing proposal.



**Direct Labor**—Provide a time-phased (e.g., monthly, quarterly, etc.) breakdown of labor hours, rates, and cost by appropriate category, and furnish bases for estimates.

**Indirect Costs**—Indicate how offeror has computed and applied offeror's indirect costs, including cost breakdowns, and showing trends and budgetary data, to provide a basis for evaluating the reasonableness of proposed rates. Indicate the rates used and provide an appropriate explanation.

**Other Costs**—List all other costs not otherwise included in the categories described above (e.g., special tooling, travel, computer and consultant services, preservation, packaging and packing, spoilage and rework, and Federal excise tax on finished articles) and provide bases for pricing.

**Royalties**—If more than \$250, provide the following information on a separate page for each separate royalty or license fee: name and address of licensor; date of license agreement; patent numbers, patent application serial numbers, or other basis on which the royalty is payable; brief description (including any part or model numbers of each contract item or component on which the royalty is payable); percentage or dollar rate of royalty per unit; unit price of contract item; number of units; and total dollar amount of royalties. In addition, if specifically requested by the contracting officer, provide a copy of the current license agreement and identification of applicable claims of specific patents. (See FAR 27.204 and 31.205-37.)

**Facilities Capital Cost of Money**—When the offeror elects to claim facilities capital cost of money as an allowable cost, the offeror must submit Form CASB-CMF and show the calculation of the proposed amount (see FAR 31.205-10).

2. As part of the specific information required, the offeror must submit with offeror's proposal, and clearly identify as such, cost or pricing data (that is, data that are verifiable and factual and otherwise as defined at FAR 15.801). In addition, submit with offeror's proposal any information reasonably required to explain offeror's estimating process, including—

a. The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and

b. The nature and amount of any contingencies included in the proposed price.

3. Whenever the offeror has incurred costs for work performed before submission of proposal, those costs must be identified in the offeror's cost/price proposal.

4. There is a clear distinction between submitting cost or pricing data and merely making available books, records, and other documents without identification. The requirement for submission of cost or pricing data is met when all accurate cost or pricing data reasonably available to the offeror have been submitted, either actually or by specific identification, to the contracting officer or an authorized representative. As later information comes into the offeror's possession, it should be promptly submitted to the contracting officer. The requirement for submission of cost or pricing data continues up to the time of final agreement on price.

5. In submitting offeror's proposal, offeror must include an index, appropriately referenced, of all the cost or pricing data and information accompanying or identified in the proposal. In addition, any future additions and/or revisions, up to the date of agreement on price, must be annotated on a supplemental index.

6. By submitting offeror's proposal, the offeror, if selected for negotiation, grants the contracting officer or an authorized representative the right to examine, at any time before award, those books, records, documents, and other types of factual information, regardless of form or whether such supporting information is specifically referenced or included in the proposal as the basis for pricing, that will permit an adequate evaluation of the proposed price.

7. As soon as practicable after final agreement on price, but before the award resulting from the proposal, the offeror shall, under the conditions stated in FAR 15.804-4, submit a Certificate of Current Cost or Pricing Data.

## 8. HEADINGS FOR SUBMISSION OF LINE-ITEM SUMMARIES:

## A. New Contracts (including Letter contracts).

COST ELEMENTS	PROPOSED CONTRACT ESTIMATE—TOTAL COST	PROPOSED CONTRACT ESTIMATE—UNIT COST	REFERENCE
(1)	(2)	(3)	(4)

Under Column (1)—Enter appropriate cost elements.

Under Column (2)—Enter those necessary and reasonable costs that in offeror's judgment will properly be incurred in efficient contract performance. When any of the costs in this column have already been incurred (e.g., under a letter contract or unpriced order), describe them on an attached supporting schedule. When preproduction or startup costs are significant, or when specifically requested to do so by the contracting officer, provide a full identification and explanation of them.

Under Column (3)—Optional, unless required by the contracting officer.

Under Column (4)—Identify the attachment in which the information supporting the specific cost element may be found. Attach separate pages as necessary.

## B. Change Orders, Modifications, and Claims.

COST ELEMENTS	ESTIMATED COST OF ALL WORK DELETED	COST OF DELETED WORK ALREADY PERFORMED	NET COST TO BE DELETED	COST OF WORK ADDED	NET COST OF CHANGE	REFERENCE
(1)	(2)	(3)	(4)	(5)	(6)	(7)

Under Column (1)—Enter appropriate cost elements.

Under Column (2)—Include (i) current estimates of what the cost would have been to complete deleted work not yet performed, and (ii) the cost of deleted work already performed.

Under Column (3)—Include the incurred cost of deleted work already performed, actually computed if possible, or estimated in the contractor's accounting records. Attach a detailed inventory of work, materials, parts, components, and hardware already purchased, manufactured, or performed and deleted by the change, indicating the cost and proposed disposition of each line item. Also, if offeror desires to retain these items or any portion of them, indicate the amount offered for them.

Under Column (4)—Enter the net cost to be deleted which is the estimated cost of all deleted work less the cost of deleted work already performed. Column (2) less Column (3) = Column (4).

Under Column (5)—Enter the offeror's estimate for cost of work added by the change. When nonrecurring costs are significant, or when specifically requested to do so by the contracting officer, provide a full identification and explanation of them. When any of the costs in this column have already been incurred, describe them on an attached supporting schedule.

Under Column (6)—Enter the net cost of change which is the cost of work added, less the net cost to be deleted. When this result is negative, place the amount in parentheses. Column (4) less Column (5) = Column (6).

Under Column (7)—Identify the attachment in which the information supporting the specific cost element may be found. Attach separate pages as necessary.

## C. Price Revision/Redetermination.

CUTOFF DATE	NUMBER OF UNITS COMPLETED	NUMBER OF UNITS TO BE COMPLETED	CONTRACT AMOUNT	REDETERMINATION PROPOSAL AMOUNT	DIFFERENCE
(1)	(2)	(3)	(4)	(5)	(6)

COST ELEMENTS	INCURRED COST—PREPRODUCTION	INCURRED COST—COMPLETED UNITS	INCURRED COST—WORK IN PROCESS	TOTAL INCURRED COST	ESTIMATED COST TO COMPLETE	ESTIMATED TOTAL COST	REFERENCE
(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)

Under Column (1)—Enter the cut off date required by the contract, if applicable.

Under Column (2)—Enter the number of units completed during the period for which experienced costs of production are being submitted.

Under Column (3)—Enter the number of units remaining to be completed under the contract.

Under Column (4)—Enter the cumulative contract amount.

Under Column (5)—Enter the offeror's redetermination proposal amount.

Under Column (6)—Enter the difference between the contract amount and the redetermination proposal amount. When this result is negative, place the amount in parentheses. Column (4) less Column (5) = Column (6).

Under Column (7)—Enter appropriate cost elements. When residual inventory exists, the final costs established under fixed-price-incentive and fixed-price-redeterminable arrangements should be net of the fair market value of such inventory. In support of subcontract costs, submit a listing of all subcontracts subject to repricing action, annotated as to their status.

Under Column (8)—Enter all costs incurred under the contract before starting production and other nonrecurring costs (usually referred to as startup costs) from offeror's books and records as of the cutoff date. These include such costs as preproduction engineering, special plant rearrangement, training program, and any identifiable nonrecurring costs such as initial rework, spoilage, pilot runs, etc. In the event the amounts are not segregated in or otherwise available from offeror's records, enter in this column offeror's best estimates. Explain the basis for each estimate and how the costs are charged on offeror's accounting records (e.g., included in production costs as direct engineering labor, charged to manufacturing overhead, etc.). Also show how the costs would be allocated to the units at their various stages of contract completion.

Under Columns (9) and (10)—Enter in Column (9) the production costs from offeror's books and records (exclusive of preproduction costs reported in Column (8)) of the units completed as of the cutoff date. Enter in Column (10) the costs of work in process as determined from offeror's records or inventories at the cutoff date. When the amounts for work in process are not available in contractor's records but reliable estimates for them can be made, enter the estimated amounts in Column (10) and enter in Column (9) the differences between the total incurred costs (exclusive of preproduction costs) as of the cutoff date and these estimates. Explain the basis for the estimates, including identification of any provision for experienced or anticipated allowances, such as shrinkage, rework, design changes, etc. Furnish experienced unit or lot costs (or labor hours) from inception of contract to the cutoff date, improvement curves, and any other available production cost history pertaining to the item(s) to which offeror's proposal relates.

Under Column (11)—Enter total incurred costs (Total of Columns (8), (9), and (10)).

Under Column (12)—Enter those necessary and reasonable costs that in contractor's judgment will properly be incurred in completing the remaining work to be performed under the contract with respect to the item(s) to which contractor's proposal relates.

Under Column (13)—Enter total estimated cost (Total of Columns (11) and (12)).

Under Column (14)—Identify the attachment in which the information supporting the specific cost element may be found. Attach separate pages as necessary.

(Then next page is 15-27.)



sidered for a reasonableness determination, the contracting officer shall document the contract file to reflect the basis of the determination.

(2) Field pricing reports are intended to give the contracting officer a detailed analysis of the proposal, for use in contract negotiations. Field pricing support personnel include, but are not limited to, administrative contracting officers, contract auditors, price analysts, quality assurance personnel, engineers, and small business and legal specialists.

(b) Contracting officers should not request field pricing support for proposed contracts or modifications of an amount less than that specified in subparagraph (a)(1) above. An exception may be made when a reasonable pricing result cannot be established, because of (1) lack of knowledge of the particular contractor, (2) sensitive conditions, or (3) an inability to evaluate the price reasonableness through price analysis or cost analysis of existing data.

(c)(1) When initiating field pricing support, the contracting officer shall do so by sending a request to the cognizant administrative contracting officer (ACO). When field pricing support is not available, or is exempted by agency regulations, the contracting officer may initiate an audit by sending the request directly to the cognizant audit office. In both cases, the contracting officer shall, in the request, (i) prescribe the extent of the support needed, (ii) state the specific areas for which input is required, (iii) include the information necessary to perform the review (such as the offeror's proposal and the applicable portions of the solicitation, particularly those describing requirements and delivery schedules), and (iv) assign a realistic deadline for receipt of the report.

(2) Assignment of unrealistically short deadlines may reduce the quality of the audit and field pricing reports and may make it impossible to establish the fairness and reasonableness of the price.

(3) Agency field pricing procedures shall not preclude free and open communication among the contracting officer, ACO, and auditor.

(4) When the contracting officer requires a field pricing review of requests for equitable adjustments, the contracting officer should provide the information listed in 43.204(b)(5).

(d) Only the auditor shall have general access to the offeror's books and financial records. This limitation does not preclude the contracting officer, the ACO, or their representatives from requesting any data from or reviewing offeror records necessary to the discharge of their responsibilities. The duties of auditors and those of other specialists may require both to evaluate the same elements of estimated costs. They shall review the data jointly or concurrently when possible, the auditor rendering services within the audit area of responsibility and the other specialists rendering services within their own areas of responsibility. The ACO or auditor, as appropriate, shall orally notify the contracting officer immediately of data provided that is so

deficient as to preclude review and any denial of access to records or to cost or pricing data considered essential to the performance of a satisfactory review. The oral notification shall be promptly confirmed in writing to the contracting officer describing the deficient or denied data or records, with copies of the deficient data if requested by the contracting officer, the need for the evidence, and the costs unsupported as a result of the denial. The contracting officer shall review the written notification and shall take immediate action to obtain the data needed. If the offeror persists in refusing to provide the data, and the contracting officer determines that the data is essential for a fair and reasonable price determination, then the contracting officer shall proceed with the action outlined in 15.804-6(e).

(e) The auditor shall begin the audit as soon as possible after receiving the contracting officer's request. The auditor is responsible for the scope and depth of the audit. As a minimum, the audit report shall include the following:

(1) The findings on specific areas listed in the contracting officer's request.

(2) An explanation of the basis and method used by the offeror in proposal preparation.

(3) An identification of the original proposal and of all subsequent written formal and other identifiable submissions by which cost or pricing data were either submitted or identified.

(4) A description of cost or pricing data coming to the attention of the auditor that were not submitted but that may have a significant effect on the proposed cost or price.

(5) A list of any cost or pricing data submitted that are not accurate, complete, and current and of any cost representations that are unsupported. When the result of deficiencies is so great that the auditor cannot perform an audit or considers the proposal unacceptable as a basis for negotiation, the contracting officer shall be orally notified so that prompt corrective action may be taken, as provided by 15.805-5(d). The auditor will immediately confirm the notification in writing, explaining the deficiencies and the cost impact on the proposal.

(6) The originals of all technical analyses received by the auditor and a quantification of the dollar effect of the technical analysis findings.

(7) If the auditor believes that the offeror's estimating methods or accounting system are inadequate to support the proposal or to permit satisfactory administration of the contract contemplated, a statement to that effect.

(8) A statement of the extent to which the auditor has discussed discrepancies or mistakes of fact in the proposal with the offeror.

(f) The auditor shall not discuss auditor conclusions or recommendations on the offeror's estimated or projected costs with the offeror unless specifically requested to do so by the contracting officer.

(g) If field pricing support was not requested,

the auditor shall send the completed audit report directly to the contracting officer. If field pricing support was requested, the auditor shall send the completed audit report to the ACO for forwarding, without change, with the field pricing report. The ACO shall consolidate the field pricing report inputs and send a field pricing report, accompanied by the original copy of the audit report, to the contracting officer by the assigned date. The ACO shall send the auditor a copy of the field pricing report (without the audit report and technical analysis). Audit and field pricing reports shall be made a part of the official contract file.

(h) If any information is disclosed after submission of a proposal that may significantly affect the audit findings, the contracting officer shall require the offeror to provide concurrent copies to the appropriate field pricing office (ACO and audit offices). In that case, the ACO or auditor, as appropriate, will be requested to immediately review the disclosed information and orally report the findings to the contracting officer, followed by a supplemental report when considered necessary.

(i) The requirements for field pricing support reports for subcontracts are prescribed in 15.806.

(j) Field pricing reports, including audit and technical reports, may contain proprietary and/or source selection information (see 3.104-4(j) and (k)) and the cover page and all pages containing such information should be marked with the appropriate legend and protected accordingly.

(k) For contracts and contract modifications expected to exceed \$100,000, activities submitting field pricing reports, including audit and technical reports, shall furnish with each report a list of all persons, or classes of persons, and, to the maximum extent practicable, the names of the individuals within the class, who have been provided access to the proprietary or source selection information (see 3.104-5(d)) at or by the activity.

## **15.806 Subcontract pricing considerations.**

### **15.806-1 General.**

(a)(1) The contracting officer is responsible for the determination of price reasonableness for the prime contract. In order to make this determination, it is required that an analysis be conducted of all the relevant facts and data including subcontractor cost or pricing data required to be submitted, results of the prime or higher tier subcontractor's analyses of subcontractor proposals, the field pricing support (if any), and historical pricing data. The fact that a contractor or higher tier subcontractor has an approved purchasing system or performs an analysis of subcontractor cost or pricing data does not in any way relieve the contracting officer or field pricing support team from the responsibility to analyze the prime contractor's submission, including the subcontractor cost or pricing data. However, the prime contractor or higher tier subcontractor is responsible for conducting appropriate price and cost analysis before awarding any subcontract.

(2) Subcontractors must submit to the contractor or higher tier subcontractor, cost or pricing data or claims for exemption from the requirement to submit them. The contractor and the higher tier subcontractor shall (i) conduct price analyses and, when the subcontractor is required to submit cost or pricing data, or if the contractor or higher tier subcontractor is unable to perform an adequate price analysis, cost analyses for all subcontracts, (ii) include the results of these analyses as part of their own cost or pricing data submission, and (iii) when required, in accordance with 15.806-2(a), submit the subcontractor cost or pricing data as part of their own cost or pricing data submission.

(b) Except when the subcontract prices are based on adequate price competition, on established catalog or market prices of commercial items sold in substantial quantities to the general public, or are set by law or regulation, any contractor required to submit certified cost or pricing data also shall obtain certified cost or pricing data before awarding any subcontract or purchase order expected to exceed the pertinent threshold set forth at 15.804-2(a)(1)(iii), or issuing any modification involving a price adjustment expected to exceed the pertinent threshold set forth at 15.804-2(a)(1)(iv) (see example of pricing adjustment at 15.804-2(a)(1)(ii)). To waive subcontractor cost or pricing data, follow the procedures at 15.804-3(i).

(c) The requirements in paragraphs (a) and (b) of this subsection, modified to relate to higher tier subcontractors rather than to the prime contractor, shall apply to lower tier subcontracts for which subcontractor cost or pricing data are required.

(d) If the prime contractor negotiates subcontract prices before negotiating the prime contract, such subcontract prices must nevertheless be reviewed and analyzed by the Government. In no instance should such negotiated subcontract prices be accepted as the sole evidence that these prices are fair and reasonable.

### **15.806-2 Prospective subcontractor cost or pricing data.**

(a) The contracting officer shall require a contractor that is required to submit certified cost or pricing data also to submit to the Government (or cause the submission of) accurate, complete, and current cost or pricing data from prospective subcontractors in support of each subcontract cost estimate that is (1) \$1,000,000 or more, (2) both more than the pertinent threshold set forth at 15.804-2(a)(1)(iii) and (iv) and more than 10 percent of the prime contractor's proposed price, or (3) considered to be necessary for adequately pricing the prime contract. These subcontract cost or pricing data may be submitted using a Standard Form 1411 (SF 1411), Contract Pricing Proposal Cover Sheet.

(b) The contracting officer shall require the prospective contractor to support subcontractor cost estimates below the threshold in 15.806-1(b) with any data or

information (including other subcontractor quotations) needed to establish a reasonable price.

(c) If the prospective contractor satisfies the contracting officer that a subcontract will be priced on the basis of one of the exemptions in 15.804-3, the contracting officer normally shall not require submission of subcontractor cost or pricing data to the Government in that case. If the subcontract estimate is based upon the cost or pricing data of the prospective subcontractor most likely to be awarded the subcontract, the contracting officer shall not require submission to the Government of data from more than one proposed subcontractor for that subcontract.

(d) Subcontractor cost or pricing data shall be accurate, complete, and current as of the date of final price agreement given on the contractor's Certificate of Current Cost or Pricing Data. The prospective contractor shall be responsible for updating a prospective subcontractor's data.

(e) In exceptional cases, the contracting officer may, with the approval of the chief of the contracting office, excuse a prospective contractor from submitting subcontractor cost or pricing data and the required related analyses before completion of negotiations of the prime contract. The prime contractor must, however, obtain this cost or pricing data before award of the subcontract in question. Any request from a prospective contractor to be excused from submitting subcontractor data before completion of negotiations of the prime contract must be supported by an explanation as to why the data and analyses cannot be submitted in a timely manner. If excusing the prospective contractor appears to be appropriate, the contracting officer shall provide the chief of the contracting office with the prospective contractor's explanation, the contracting officer's supporting rationale, and a discussion of how the subcontract price will be determined to be fair and reasonable or what steps will be taken to protect the interest of the Government; e.g., include a contract clause that provides for negotiating an adjustment to the prime contract amount after award.

#### 15.806-3 Field pricing reports.

(a) When obtaining field pricing support on a prime contractor proposal in accordance with 15.805-5, the contracting officer should request audit or field pricing support to analyze and evaluate the proposal of a subcontractor at any tier (notwithstanding availability of data or analyses performed by the prime contractor) if the contracting officer believes that such support is necessary to ensure reasonableness of the total proposed price. This step may be appropriate when, for example—

(1) There is a business relationship between the contractor and subcontractor not conducive to independence and objectivity;

(2) The contractor is a sole source and the subcontract costs represent a substantial part of the contract cost;

(3) The contractor has been denied access to the subcontractor's records; or

(4) The contracting officer determines that, because of factors such as the size of the proposed subcontract price, audit or field pricing support for a subcontract or subcontracts at any tier is critical to a fully detailed analysis of the prime contract proposal.

(b) When the contracting officer requests the cognizant ACO or auditor to review a subcontractor's cost estimates, the request shall include, when available, a copy of any review prepared by the prime contractor or higher tier subcontractor, the subcontractor's proposal, cost or pricing data provided by the subcontractor, and the results of the prime contractor's cost or price analysis.

(c) When the Government performs the subcontract analysis, the Government shall furnish to the prime contractor or higher tier subcontractor, with the consent of the subcontractor reviewed, a summary of the analysis performed in determining any unacceptable costs, by element, included in the subcontract proposal. If the subcontractor withholds consent, the Government shall furnish a range of unacceptable costs for each element in such a way as to prevent disclosure of subcontractor proprietary data.

#### 15.807 Prenegotiation objectives.

(a) The process of determining prenegotiation objectives helps the contracting officer to judge the overall reasonableness of proposed prices and to negotiate a fair and reasonable price or cost and fee. In setting the prenegotiation objectives, the contracting officer shall analyze the offeror's proposal, taking into account the field pricing report, if any; any audit report and technical analysis whether or not part of a field pricing report; and other pertinent data such as independent Government cost estimates and price histories. This process may include fact-finding sessions with the offeror when the contracting officer deems appropriate.

(b) The contracting officer shall establish prenegotiation objectives before the negotiation of any pricing action. The scope and depth of the analysis supporting the objectives should be directly related to the dollar value, importance, and complexity of the pricing action. When cost analysis is required, the analysis shall address (1) the pertinent issues to be negotiated, (2) the cost objectives, and (3) a profit or fee objective.

(c) The Government's cost objective and proposed pricing arrangement directly affect the profit or fee objective. Because profit or fee is only one of several interrelated variables, the contracting officer shall not agree on profit or fee without concurrent agreement on cost and type of contract. Specific agreement on the exact values or weights assigned to individual profit-analysis factors (see 15.905) is not required during negotiations and should not be attempted.

#### 15.808 Price negotiation memorandum.

(a) At the conclusion of each negotiation of an initial or revised price, the contracting officer shall promptly prepare a memorandum of the principal elements of the price nego-

tiation. The memorandum shall be included in the contract file and shall contain the following minimum information:

- (1) The purpose of the negotiation.
- (2) A description of the acquisition, including appropriate identifying numbers (e.g., RFP No.).
- (3) The name, position, and organization of each person representing the contractor and the Government in the negotiation.
- (4) The current status of the contractor's purchasing system when material is a significant cost element and the current status of other contractor systems (e.g., estimating, accounting, and compensation) to the extent that these additional systems affected and were considered in the negotiation.
- (5) If certified cost or pricing data were required, the extent to which the contracting officer—
  - (i) Relied on the cost or pricing data submitted and used them in negotiating the price; and
  - (ii) Recognized as inaccurate, incomplete, or non-current any cost or pricing data submitted; the action taken by the contracting officer and the contractor as a result; and the effect of the defective data on the price negotiated.
- (6) If cost or pricing data were not required in the case of any price negotiation exceeding the thresholds set forth at 15.804-2(a)(1), the exemption or waiver used and the basis for claiming or granting it.
- (7) If certified cost or pricing data were required by the contracting officer under 15.804-2(a)(2), the rationale for such requirement.
- (8) A summary of the contractor's proposal, the field pricing report recommendations, and the reasons for any pertinent variances from the field pricing report recommendations. Where the determination of price reasonableness is based on cost analysis, the summary shall address the amount of each major cost element (i) proposed by the contractor, (ii) recommended by the field or other pricing assistance report (if any), (iii) contained in the Government's negotiation objective, and (iv) considered negotiated as a part of the price.
- (9) The most significant facts or considerations controlling the establishment of the prenegotiation price objective and the negotiated price including an explanation of any significant differences between the two positions. To the extent such direction is received, the price negotiation memorandum (PNM) shall discuss and quantify the impact of direction given by Congress, other agencies, and higher level officials (i.e., officials who would not normally exercise authority during the award and review process for the instant contract action) if the direction has had a significant effect on the action.
- (10) The basis for determining the profit or fee prenegotiation objective and the profit or fee negotiated.

(b) Whenever a field pricing report has been submitted, the contracting officer shall forward a copy of the price negotiation memorandum (PNM) to the cognizant audit office and a copy to the cognizant administrative contracting officer. When appropriate, information on how the advisory services of the field pricing support team can be made more effective should be provided separately.

#### 15.809 Forward pricing rates agreements.

(a) Negotiation of forward pricing rate agreements (FPRA's) may be requested by the contracting officer or the contractor or initiated by the administrative contracting officer (ACO). In determining whether or not to establish such an agreement, the ACO should consider whether the benefits to be derived from the agreement are commensurate with the effort of establishing and monitoring it. Normally, FPRA's should be negotiated only with contractors having a significant volume of Government contract proposals. The cognizant contract administration agency shall determine whether an FPRA will be established.

(b) The ACO shall obtain the contractor's proposal and require that it include cost or pricing data that are accurate, complete, and current as of the date of submission. The ACO shall invite the cognizant contract auditor and contracting offices having a significant interest to participate in developing a Government objective and in the negotiations. Upon completing negotiations, the ACO shall prepare a price negotiation memorandum (PNM) (see 15.808) and forward copies of the PNM and FPRA to the cognizant auditor and to all contracting offices that are known to be affected by the FPRA. A Certificate of Current Cost or Pricing Data shall not be required at this time (see 15.804-4(g)).

(c) The FPRA shall provide specific terms and conditions covering expiration, application, and data requirements for systematic monitoring to assure the validity of the rates. The agreement shall provide for cancellation at the option of either party and shall require the contractor to submit to the ACO and to the cognizant contract auditor any significant change in cost or pricing data.

(d) Offerors are required (see 15.804-4(g)) to describe any FPRA's in each specific pricing proposal to which the rates apply and identify the latest cost or pricing data already submitted in accordance with the agreement. All data submitted in connection with the agreement, updated as necessary, form a part of the total data that the offeror certifies to be accurate, complete, and current at the time of agreement on price for an initial contract or for a contract modification.

(e) Contracting officers will use FPRA rates as bases for pricing all contracts, modifications, and other contractual actions to be performed during the period covered by the agreement, unless the ACO determines that changed conditions have invalidated part or all of the agreement. Conditions that may affect the agreement's validity shall be



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## PART 25—FOREIGN ACQUISITION

25.902

## SUBPART 25.9—ADDITIONAL FOREIGN ACQUISITION CLAUSES

**25.901 Omission of the examination of records clause.**

(a) *Definition.* "Foreign contractor," as used in this subpart, means a contractor or subcontractor organized or existing under the laws of a country other than the United States, its territories, or possessions.

(b) *Policy.* As required by 10 U.S.C. 2313, 41 U.S.C. 254, and 15.106-1(b)(3), the contracting officer shall consider for use in negotiated contracts with foreign contractors, whenever possible, the clause at 52.215-1, Examination of Records by Comptroller General. Omission of the clause should be approved only after the contracting agency, having considered such factors as alternate sources of supply, additional cost, and time of delivery, has made all reasonable efforts to include the clause.

(c) *Conditions for omission.* (1)(i) The contracting officer may omit the clause at 52.215-1, Examination of Records by Comptroller General, from contracts with foreign contractors—

(A) If the agency head determines, with the concurrence of the Comptroller General or a designee, the omission of the clause will serve the public interest; or

(B) If the contractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination,

and the agency head determines, after taking into account the price and availability of the property or services from domestic sources, that omission of the clause best serves the public interest.

(ii) When a determination under subdivision (c)(1)(i)(B) of this section is the basis for omission of the clause at 52.215-1, Examination of Records by Comptroller General, the agency head shall forward a written report to the Congress explaining the reasons for the determination.

(d) *Determination and findings.* The determination and findings shall—

(1) Identify the contract and its purpose, and whether it is a contract with a foreign contractor or with a foreign government or agency thereof;

(2) Describe the efforts to include the clause;

(3) State the reasons for the contractor's refusal to include the clause;

(4) Describe the price and availability of the property or services from the United States and other sources; and

(5) Determine that it will serve the interest of the United States to omit the clause.

**25.902 Inconsistency between English version and translation of contract.**

The contracting officer shall insert the clause at 52.225-14, Inconsistency Between English Version and Translation of Contract, in solicitations and contracts whenever translation into another language is anticipated.



**PART 33**

**PROTESTS, DISPUTES, AND APPEALS**

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I



## PROTESTS, DISPUTES, AND APPEALS

33.204

interested party to be entitled to the costs of—

- (i) Filing and pursuing the protest, including reasonable attorney's fees; and
- (ii) Bid and proposal preparation.

(2) Costs awarded under subparagraph (f)(1) of this section shall be paid out in accordance with the procedures provided in 31 U.S.C. 1304 (the Permanent Indefinite Judgment Fund).

(g) The GSBICA's final decision may be appealed by the agency or by any interested party, including any intervening interested parties, as set forth in Subpart 33.2.

### 33.106 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.233-2, Service of Protest, in solicitations for other than small purchases.

(b) The contracting officer shall insert the clause at 52.233-3, Protest After Award, in all solicitations and contracts. If a cost reimbursement contract is contemplated, the contracting officer shall use the clause with its *Alternate I*.

## SUBPART 33.2—DISPUTES AND APPEALS

### 33.201 Definitions.

"Alternative dispute resolution" means any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation. These procedures include, but are not limited to, settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration.

"Claim," as used in this part, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$50,000 is not a claim under the Contract Disputes Act of 1978 until certified as required by the Act and 33.207. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

"Issue in controversy" means a material disagreement between the Government and the contractor related to a claim or which could result in a claim. An issue in controversy can be all or part of a claim.

"Misrepresentation of fact," as used in this part, means a false statement of substantive fact, or any conduct which leads to the belief of a substantive fact material to proper

understanding of the matter in hand, made with intent to deceive or mislead.

"Neutral person," as used in this subpart, means an impartial third party, who serves as a mediator, fact finder, or arbitrator, or otherwise functions to assist the parties to resolve the issues in controversy. A neutral person may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties. A neutral person shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral person may serve (5 U.S.C. 583).

### 33.202 Contract Disputes Act of 1978.

The Contract Disputes Act of 1978 (41 U.S.C. 601-613)(the Act) as amended by the Administrative Dispute Resolution Act (Pub. L. 101-552) establishes procedures and requirements for asserting and resolving claims subject to the Act. In addition, the Act provides for: (a) the payment of interest on contractor claims; (b) certification of contractor claims; and (c) a civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.

### 33.203 Applicability.

(a) Except as specified in paragraph (b) below, this part applies to any express or implied contract covered by the Federal Acquisition Regulation.

(b) This subpart does not apply to any contract with (1) a foreign government or agency of that government, or (2) an international organization or a subsidiary body of that organization, if the agency head determines that the application of the Act to the contract would not be in the public interest.

(c) This part applies to all disputes with respect to contracting officer decisions on matters "arising under" or "relating to" a contract. Agency Boards of Contract Appeals (BCA's) authorized under the Act continue to have all of the authority they possessed before the Act with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The clause at 52.233-1, Disputes, recognizes the "all disputes" authority established by the Act and states certain requirements and limitations of the Act for the guidance of contractors and contracting agencies. The clause is not intended to affect the rights and obligations of the parties as provided by the Act or to constrain the authority of the statutory agency BCA's in the handling and deciding of contractor appeals under the Act.

### 33.204 Policy.

The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Agencies are encouraged to use

alternative dispute resolution (ADR) procedures to the maximum extent practicable in accordance with the authority and the requirements of the Administrative Dispute Resolution Act (Pub. L. 101-552) and agency policies.

### **33.205 Relationship of the Act to Public Law 85-804.**

(a) Requests for relief under Public Law 85-804 (50 U.S.C. 1431-1435) are not claims within the Contract Disputes Act of 1978 or the Disputes clause at 52.233-1, Disputes, and shall be processed under Part 50, Extraordinary Contractual Actions. However, relief formerly available only under Public Law 85-804; i.e., legal entitlement to rescission or reformation for mutual mistake, is now available within the authority of the contracting officer under the Contract Disputes Act of 1978 and the Disputes clause. In case of a question whether the contracting officer has authority to settle or decide specific types of claims, the contracting officer should seek legal advice.

(b) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake shall be treated as a claim under the Act. A contract may be reformed or rescinded by the contracting officer if the contractor would be entitled to such remedy or relief under the law of Federal contracts. Due to the complex legal issues likely to be associated with allegations of legal entitlement, contracting officers shall make written decisions, prepared with the advice and assistance of legal counsel, either granting or denying relief in whole or in part.

(c) A claim that is either denied or not approved in its entirety under paragraph (b) above may be cognizable as a request for relief under Public Law 85-804 as implemented by Part 50. However, the claim must first be submitted to the contracting officer for consideration under the Contract Disputes Act of 1978 because the claim is not cognizable under Public Law 85-804, as implemented by Part 50, unless other legal authority in the agency concerned is determined to be lacking or inadequate.

### **33.206 Initiation of a claim.**

(a) Contractor claims shall be submitted in writing to the contracting officer for a decision. The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor.

### **33.207 Contractor claim certification.**

(a) A contractor claim exceeding \$50,000, or any claim regardless of amount when using alternative dispute resolution procedures, shall be accompanied by a certification that—

- (1) The claim is made in good faith;
- (2) Supporting data are accurate and complete to the

best of the contractor's knowledge and belief; and

(3) The amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

(b) The aggregate amount of both the increased and decreased costs shall be used in determining when the dollar thresholds requiring claim certification are met (see the example in subdivision 15.804-2(a)(1)(ii)).

(c)(1) If the contractor is an individual, the certification shall be executed by that individual.

(2) If the contractor is not an individual, the certification shall be executed by—

(i) A senior company official in charge at the contractor's plant or location involved; or

(ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

### **33.208 Interest on claims.**

The Government shall pay interest on a contractor's claim on the amount found due and unpaid from (a) the date the contracting officer receives the claim (properly certified if required by 33.207(a)), or (b) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the contracting officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim. See 32.614 for the right of the Government to collect interest on its claims against a contractor.

### **33.209 Suspected fraudulent claims.**

If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the agency official responsible for investigating fraud.

### **33.210 Contracting officer's authority.**

Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or settle all claims arising under or relating to a contract subject to the Act. This authorization does not extend to—

(a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or

(b) The settlement, compromise, payment, or adjustment of any claim involving fraud.

### **33.211 Contracting officer's decision.**

(a) When a claim by or against a contractor cannot be



## PART 33—PROTESTS, DISPUTES, AND APPEALS

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satisfied or settled by mutual agreement and a decision on the claim is necessary, the contracting officer shall—

- (1) Review the facts pertinent to the claim;
- (2) Secure assistance from legal and other advisors;
- (3) Coordinate with the contract administration office or contracting office, as appropriate; and
- (4) Prepare a written decision that shall include a—
  - (i) Description of the claim or dispute;
  - (ii) Reference to the pertinent contract terms;
  - (iii) Statement of the factual areas of agreement and disagreement;
  - (iv) Statement of the contracting officer's decision, with supporting rationale;
  - (v) Paragraph substantially as follows:

This is the final decision of the Contracting Officer. You may appeal this decision to the Board of Contract Appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the Board of Contract Appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. Instead of appealing to the Board of Contract Appeals, you may bring an action directly in the U.S. Claims Court (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision. If you appeal to the Board of Contract Appeals, you may, solely at your election, proceed under the Board's small claims procedure for claims of \$10,000 or less or its accelerated procedure for claims of \$50,000 or less; and

- (vi) Demand for payment prepared in accordance with 32.610(b) in all cases where the decision results in a finding that the contractor is indebted to the Government.

(b) The contracting officer shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt. This requirement shall apply to decisions on claims initiated by or against the contractor.

(c) The contracting officer shall issue the decision within the following statutory time limitations:

- (1) For claims of \$50,000 or less, 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request.
- (2) For claims over \$50,000, 60 days after receiving a certified claim; *provided, however*, that if a decision will not be issued within 60 days, the contracting officer shall notify the contractor, within that period, of the time within which a decision will be issued.

(d) The contracting officer shall issue a decision within a reasonable time, taking into account—

- (1) The size and complexity of the claim;

(2) The adequacy of the contractor's supporting data; and

- (3) Any other relevant factors.

(e) In the event of undue delay by the contracting officer in rendering a decision on a claim, the contractor may request the agency BCA to direct the contracting officer to issue a decision in a specified time period determined by the BCA.

(f) Any failure of the contracting officer to issue a decision within the required time periods will be deemed a decision by the contracting officer denying the claim and will authorize the contractor to file an appeal or suit on the claim.

(g) The amount determined payable under the decision, less any portion already paid, should be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party.

### 33.212 Contracting officer's duties upon appeal.

To the extent permitted by any agency procedures controlling contacts with agency BCA personnel, the contracting officer shall provide data, documentation, information, and support as may be required by the agency BCA for use on a pending appeal from the contracting officer's decision.

### 33.213 Obligation to continue performance.

(a) In general, before passage of the Act, the obligation to continue performance applied only to claims arising under a contract. However, Section 6(b) of the Act authorizes agencies to require a contractor to continue contract performance in accordance with the contracting officer's decision pending final decision on a claim relating to the contract. In recognition of this fact, an alternate paragraph is provided for paragraph (h) of the clause at 52.233-1, Disputes. This paragraph shall be used only as authorized by agency procedures.

(b) In all contracts that include the clause at 52.233-1, Disputes, with its Alternate I, in the event of a dispute not arising under, but relating to, the contract, the contracting officer shall consider providing, through appropriate agency procedures, financing of the continued performance; *provided*, that the Government's interest is properly secured.

### 33.214 Alternative dispute resolution.

(a) The objective of using alternative dispute resolution (ADR) procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy. Essential elements of ADR include—

- (1) Existence of an issue in controversy;
- (2) A voluntary election by both parties to participate in the ADR process;
- (3) An agreement on alternative procedures and terms to be used in lieu of formal litigation;

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(4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy; and

(5) Certification by the contractor in accordance with 33.207.

(b) ADR procedures may be used at any time that the contracting officer has authority to settle the issue in controversy and can be applied to a portion of a claim. When ADR procedures are used subsequent to issuance of a contracting officer's final decision, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the contracting officer's final decision and does not constitute a reconsideration of the

final decision.

(c) When appropriate, a neutral person may be used to facilitate resolution of the issue in controversy using the procedures chosen by the parties.

**33.215 Contract clause.**

The contracting officer shall insert the clause at 52.233-1, Disputes, in solicitations and contracts, unless the conditions in 33.203 apply. If it is determined under agency procedures that continued performance is necessary pending resolution of any claim arising under or relating to the contract, the contracting officer shall use the clause with its Alternate I.

- 52.215-30 Facilities Capital Cost of Money.
- 52.215-31 Waiver of Facilities Capital Cost of Money.
- 52.215-32 Certification of Commercial Pricing for Parts or Components.
- 52.215-33 Order of Precedence.
- 52.215-34 Evaluation of Offers for Multiple Awards.
- 52.215-35 Annual Representations and Certifications—Negotiation.
- 52.215-36 Late Submissions, Modifications, and Withdrawals of Proposals (Overseas).
- 52.215-37 Commercial Pricing Certificate—Notice.
- 52.215-38 Preparation of Offers—Construction.
- 52.215-39 Reversion or Adjustment of Plans for Postretirement Benefits Other Than Pensions (PRB).
- 52.216-1 Type of Contract.
- 52.216-2 Economic Price Adjustment—Standard Supplies.
- 52.216-3 Economic Price Adjustment—Semistandard Supplies.
- 52.216-4 Economic Price Adjustment—Labor and Material.
- 52.216-5 Price Redetermination—Prospective.
- 52.216-6 Price Redetermination—Retroactive.
- 52.216-7 Allowable Cost and Payment.
- 52.216-8 Fixed Fee.
- 52.216-9 Fixed Fee—Construction.
- 52.216-10 Incentive Fee.
- 52.216-11 Cost Contract—No Fee.
- 52.216-12 Cost-Sharing Contract—No Fee.
- 52.216-13 Allowable Cost and Payment—Facilities.
- 52.216-14 Allowable Cost and Payment—Facilities Use.
- 52.216-15 Predetermined Indirect Cost Rates.
- 52.216-16 Incentive Price Revision—Firm Target.
- 52.216-17 Incentive Price Revision—Successive Targets.
- 52.216-18 Ordering.
- 52.216-19 Delivery-Order Limitations.
- 52.216-20 Definite Quantity.
- 52.216-21 Requirements.
- 52.216-22 Indefinite Quantity.
- 52.216-23 Execution and Commencement of Work.
- 52.216-24 Limitation of Government Liability.
- 52.216-25 Contract Definitization.
- 52.216-26 Payments of Allowable Costs Before Definitization.
- 52.217-1 Limitation of Price and Contractor Obligations.
- 52.217-2 Cancellation of Items.
- 52.217-3 Evaluation Exclusive of Options.
- 52.217-4 Evaluation of Options Exercised at Time of Contract Award.
- 52.217-5 Evaluation of Options.
- 52.217-6 Option for Increased Quantity.
- 52.217-7 Option for Increased Quantity—Separately Priced Line Item.
- 52.217-8 Option to Extend Services.
- 52.217-9 Option to Extend the Term of the Contract.
- 52.218 Reserved.
- 52.219-1 Small Business Concern Representation.
- 52.219-2 Small Disadvantaged Business Concern Representation.
- 52.219-3 Women-Owned Small Business Representation.
- 52.219-4 Notice of Small Business-Small Purchase Set-Aside.
- 52.219-5 Notice of Total Small Business-Labor Surplus Area Set-Aside.
- 52.219-6 Notice of Total Small Business Set-Aside.
- 52.219-7 Notice of Partial Small Business Set-Aside.
- 52.219-8 Utilization of Small Business Concerns and Small Disadvantaged Business Concerns.
- 52.219-9 Small Business and Small Disadvantaged Business Subcontracting Plan.
- 52.219-10 Incentive Subcontracting Program for Small and Small Disadvantaged Business Concerns.
- 52.219-11 Special 8(a) Contract Conditions.
- 52.219-12 Special 8(a) Subcontract Conditions.
- 52.219-13 Utilization of Women-Owned Small Businesses.
- 52.219-14 Limitations on Subcontracting.
- 52.219-15 Notice of Participation by Organizations for the Handicapped.
- 52.219-16 Liquidated Damages—Small Business Subcontracting Plan.
- 52.219-17 Section 8(a) Award.
- 52.219-18 Notification of Competition Limited to Eligible 8(a) Concerns.
- 52.219-19 Small Business Concern Representation for the Small Business Competitiveness Demonstration Program.
- 52.219-20 Notice of Emerging Small Business Set-Aside.
- 52.219-21 Small Business Size Representation for Targeted Industry Categories under the Small Business Competitiveness Demonstration Program.
- 52.219-22 SIC Code and Small Business Size Standard.
- 52.220-1 Preference for Labor Surplus Area Concerns.
- 52.220-2 Notice of Total Labor Surplus Area Set-Aside.
- 52.220-3 Utilization of Labor Surplus Area Concerns.
- 52.220-4 Labor Surplus Area Subcontracting Program.
- 52.221 Reserved.
- 52.222-1 Notice to the Government of Labor Disputes.
- 52.222-2 Payment for Overtime Premiums.
- 52.222-3 Convict Labor.
- 52.222-4 Contract Work Hours and Safety Standards Act—Overtime Compensation.
- 52.222-5 Reserved.
- 52.222-6 Davis-Bacon Act.
- 52.222-7 Withholding of Funds.
- 52.222-8 Payrolls and Basic Records.
- 52.222-9 Apprentices and Trainees.

- 52.222-10 Compliance with Copeland Act Requirements.
- 52.222-11 Subcontracts (Labor Standards).
- 52.222-12 Contract Termination—Debarment.
- 52.222-13 Compliance with Davis-Bacon and Related Act Regulations.
- 52.222-14 Disputes Concerning Labor Standards.
- 52.222-15 Certification of Eligibility.
- 52.222-16 Approval of Wage Rates.
- 52.222-17 Labor Standards for Construction Work—Facilities Contracts.
- 52.222-18 Reserved.
- 52.222-19 Walsh-Healey Public Contracts Act Representation.
- 52.222-20 Walsh-Healey Public Contracts Act.
- 52.222-21 Certification of Nonsegregated Facilities.
- 52.222-22 Previous Contracts and Compliance Reports.
- 52.222-23 Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity.
- 52.222-24 Preaward On-Site Equal Opportunity Compliance Review.
- 52.222-25 Affirmative Action Compliance.
- 52.222-26 Equal Opportunity.
- 52.222-27 Affirmative Action Compliance Requirements for Construction.
- 52.222-28 Equal Opportunity Preaward Clearance of Subcontracts.
- 52.222-29 Notification of Visa Denial.
- 52.222-30 Reserved.
- 52.222-31—52.222-34 Reserved.
- 52.222-35 Affirmative Action for Special Disabled and Vietnam Era Veterans.
- 52.222-36 Affirmative Action for Handicapped Workers.
- 52.222-37 Employment Reports on Special Disabled Veterans and Veterans of the Vietnam Era.
- 52.222-38 Reserved.
- 52.222-39 Reserved.
- 52.222-40 Service Contract Act of 1965, as Amended—Contracts of \$2,500 or Less.
- 52.222-41 Service Contract Act of 1965, as Amended.
- 52.222-42 Statement of Equivalent Rates for Federal Hires.
- 52.222-43 Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts).
- 52.222-44 Fair Labor Standards Act and Service Contract Act—Price Adjustment.
- 52.222-45 Notice of Compensation for Professional Employees.
- 52.222-46 Evaluation of Compensation for Professional Employees.
- 52.222-47 SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreements (CBA).
- 52.222-48 Exemption from Application of Service Contract Act Provisions for Contracts for Maintenance, Calibration, and/or Repair of Certain ADP, Scientific and Medical, and/or Office and Business Equipment—Contractor Certification.
- 52.222-49 Service Contract Act—Place of Performance Unknown.
- 52.223-1 Clean Air and Water Certification.
- 52.223-2 Clean Air and Water.
- 52.223-3 Hazardous Material Identification and Material Safety Data.
- 52.223-4 Recovered Material Certification.
- 52.223-5 Certification Regarding A Drug-Free Workplace.
- 52.223-6 Drug-Free Workplace.
- 52.223-7 Notice of Radioactive Materials.
- 52.224-1 Privacy Act Notification.
- 52.224-2 Privacy Act.
- 52.225-1 Buy American Certificate.
- 52.225-2 Waiver of Buy American Act for Civil Aircraft and Related Articles.
- 52.225-3 Buy American Act—Supplies.
- 52.225-4 Reserved.
- 52.225-5 Buy American Act—Construction Materials.
- 52.225-6 Balance of Payments Program Certificate.
- 52.225-7 Balance of Payments Program.
- 52.225-8 Buy American Act—Trade Agreements Act—Balance of Payments Program Certificate.
- 52.225-9 Buy American Act—Trade Agreements Act—Balance of Payments Program.
- 52.225-10 Duty-Free Entry.
- 52.225-11 Restrictions on Certain Foreign Purchases.
- 52.225-12—52.225-13 Reserved.
- 52.225-14 Inconsistency Between English Version and Translation of Contract.
- 52.226 Reserved.
- 52.227-1 Authorization and Consent.
- 52.227-2 Notice and Assistance Regarding Patent and Copyright Infringement.
- 52.227-3 Patent Indemnity.
- 52.227-4 Patent Indemnity—Construction Contracts.
- 52.227-5 Waiver of Indemnity.
- 52.227-6 Royalty Information.
- 52.227-7 Patents—Notice of Government Licensee.
- 52.227-8 Reserved.
- 52.227-9 Refund of Royalties.
- 52.227-10 Filing of Patent Applications—Classified Subject Matter.
- 52.227-11 Patent Rights—Retention by the Contractor (Short Form).
- 52.227-12 Patent Rights—Retention by the Contractor (Long Form).
- 52.227-13 Patent Rights—Acquisition by the Government.
- 52.227-14 Rights in Data—General.
- 52.227-15 Representation of Limited Rights Data and Restricted Computer Software.

- 52.227-16 Additional Data Requirements.
- 52.227-17 Rights in Data—Special Works.
- 52.227-18 Rights in Data—Existing Works.
- 52.227-19 Commercial Computer Software—Restricted Rights.
- 52.227-20 Rights in Data—SBIR Program.
- 52.227-21 Technical Data Certification, Revision, and Withholding of Payment—Major Systems.
- 52.227-22 Major System—Minimum Rights.
- 52.227-23 Rights to Proposal Data (Technical).
- 52.228-1 Bid Guarantee.
- 52.228-2 Additional Bond Security.
- 52.228-3 Workers' Compensation Insurance (Defense Base Act).
- 52.228-4 Workers' Compensation and War-Hazard Insurance Overseas.
- 52.228-5 Insurance—Work on a Government Installation.
- 52.228-6 Insurance—Immunity From Tort Liability.
- 52.228-7 Insurance—Liability to Third Persons.
- 52.228-8 Liability and Insurance—Leased Motor Vehicles.
- 52.228-9 Cargo Insurance.
- 52.228-10 Vehicular and General Public Liability Insurance.
- 52.228-11 Pledges of Assets.
- 52.229-1 State and Local Taxes.
- 52.229-2 North Carolina State and Local Sales and Use Tax.
- 52.229-3 Federal, State, and Local Taxes.
- 52.229-4 Federal, State, and Local Taxes (Noncompetitive Contract).
- 52.229-5 Taxes—Contracts Performed in U.S. Possessions or Puerto Rico.
- 52.229-6 Taxes—Foreign Fixed-Price Contracts.
- 52.229-7 Taxes—Fixed-Price Contracts with Foreign Governments.
- 52.229-8 Taxes—Foreign Cost-Reimbursement Contracts.
- 52.229-9 Taxes—Cost-Reimbursement Contracts with Foreign Governments.
- 52.229-10 State of New Mexico Gross Receipts and Compensating Tax.
- 52.230-1 Cost Accounting Standards Notices and Certification (National Defense).
- 52.230-2 Cost Accounting Standards Notices and Certification (Nondefense).
- 52.230-3 Cost Accounting Standards.
- 52.230-4 Administration of Cost Accounting Standards.
- 52.230-5 Disclosure and Consistency of Cost Accounting Practices.
- 52.230-6 Consistency in Cost Accounting Practices.
- 52.231 Reserved.
- 52.232-1 Payments.
- 52.232-2 Payments under Fixed-Price Research and Development Contracts.
- 52.232-3 Payments under Personal Services Contracts.
- 52.232-4 Payments under Transportation Contracts and Transportation-Related Services Contracts.
- 52.232-5 Payments under Fixed-Price Construction Contracts.
- 52.232-6 Payment under Communication Service Contracts with Common Carriers.
- 52.232-7 Payments under Time-and-Materials and Labor-Hour Contracts.
- 52.232-8 Discounts for Prompt Payment.
- 52.232-9 Limitation on Withholding of Payments.
- 52.232-10 Payments under Fixed-Price Architect-Engineer Contracts.
- 52.232-11 Extras.
- 52.232-12 Advance Payments.
- 52.232-13 Notice of Progress Payments.
- 52.232-14 Notice of Availability of Progress Payments Exclusively for Small Business Concerns.
- 52.232-15 Progress Payments Not Included.
- 52.232-16 Progress Payments.
- 52.232-17 Interest.
- 52.232-18 Availability of Funds.
- 52.232-19 Availability of Funds for the Next Fiscal Year.
- 52.232-20 Limitation of Cost.
- 52.232-21 Limitation of Cost (Facilities).
- 52.232-22 Limitation of Funds.
- 52.232-23 Assignment of Claims.
- 52.232-24 Prohibition of Assignment of Claims.
- 52.232-25 Prompt Payment.
- 52.232-26 Prompt Payment for Fixed-Price Architect-Engineer Contracts.
- 52.232-27 Prompt Payment for Construction Contracts.
- 52.232-28 Electronic Funds Transfer Payment Methods.
- 52.233-1 Disputes.
- 52.233-2 Service of Protest.
- 52.233-3 Protest after Award.
- 52.234 Reserved.
- 52.235 Reserved.
- 52.236-1 Performance of Work by the Contractor.
- 52.236-2 Differing Site Conditions.
- 52.236-3 Site Investigation and Conditions Affecting the Work.
- 52.236-4 Physical Data.
- 52.236-5 Material and Workmanship.
- 52.236-6 Superintendence by the Contractor.
- 52.236-7 Permits and Responsibilities.
- 52.236-8 Other Contracts.
- 52.236-9 Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements.
- 52.236-10 Operations and Storage Areas.
- 52.236-11 Use and Possession Prior to Completion.
- 52.236-12 Cleaning Up.
- 52.236-13 Accident Prevention.
- 52.236-14 Availability and Use of Utility Services.

- 52.236-15 Schedules for Construction Contracts.
- 52.236-16 Quantity Surveys.
- 52.236-17 Layout of Work.
- 52.236-18 Work Oversight in Cost-Reimbursement Construction Contracts.
- 52.236-19 Organization and Direction of the Work.
- 52.236-20 Reserved.
- 52.236-21 Specifications and Drawings for Construction.
- 52.236-22 Design Within Funding Limitations.
- 52.236-23 Responsibility of the Architect-Engineer Contractor.
- 52.236-24 Work Oversight in Architect-Engineer Contracts.
- 52.236-25 Requirements for Registration of Designers.
- 52.237-1 Site Visit.
- 52.237-2 Protection of Government Buildings, Equipment, and Vegetation.
- 52.237-3 Continuity of Services.
- 52.237-4 Payment by Government to Contractor.
- 52.237-5 Payment by Contractor to Government.
- 52.237-6 Incremental Payment by Contractor to Government.
- 52.237-7 Indemnification and Medical Liability Insurance.
- 52.237-8 Severance Payments to Foreign Nationals Employed Under a Service Contract Performed Outside the United States.
- 52.237-9 Reserved.
- 52.238 Reserved.
- 52.239 Reserved.
- 52.240 Reserved.
- 52.241 Reserved.
- 52.242-1 Notice of Intent to Disallow Costs.
- 52.242-2 Production Progress Reports.
- 52.242-3 Reserved.
- 52.242-4 Reserved.
- 52.242-5 Reserved.
- 52.242-6 Reserved.
- 52.242-7 Reserved.
- 52.242-8 Reserved.
- 52.242-9 Reserved.
- 52.242-10 F.o.b. Origin—Government Bills of Lading or Prepaid Postage.
- 52.242-11 F.o.b. Origin—Government Bills of Lading or Indicia Mail.
- 52.242-12 Report of Shipment (REPSHIP).
- 52.242-13 Bankruptcy.
- 52.243-1 Changes—Fixed-Price.
- 52.243-2 Changes—Cost-Reimbursement.
- 52.243-3 Changes—Time-and-Materials or Labor-Hours.
- 52.243-4 Changes.
- 52.243-5 Changes and Changed Conditions.
- 52.243-6 Change Order Accounting.
- 52.243-7 Notification of Changes.
- 52.244-1 Subcontracts (Fixed-Price Contracts).
- 52.244-2 Subcontracts (Cost-Reimbursement and Letter Contracts).
- 52.244-3 Subcontracts (Time-and-Materials and Labor-Hour Contracts).
- 52.244-4 Subcontractors and Outside Associates and Consultants.
- 52.244-5 Competition in Subcontracting.
- 52.245-1 Property Records.
- 52.245-2 Government Property (Fixed-Price Contracts).
- 52.245-3 Identification of Government-Furnished Property.
- 52.245-4 Government-Furnished Property (Short Form).
- 52.245-5 Government Property (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts).
- 52.245-6 Liability for Government Property (Demolition Services Contracts).
- 52.245-7 Government Property (Consolidated Facilities).
- 52.245-8 Liability for the Facilities.
- 52.245-9 Use and Charges.
- 52.245-10 Government Property (Facilities Acquisition).
- 52.245-11 Government Property (Facilities Use).
- 52.245-12 Contract Purpose (Nonprofit Educational Institutions).
- 52.245-13 Accountable Facilities (Nonprofit Educational Institutions).
- 52.245-14 Use of Government Facilities.
- 52.245-15 Transfer of Title to the Facilities.
- 52.245-16 Facilities Equipment Modernization.
- 52.245-17 Special Tooling.
- 52.245-18 Special Test Equipment.
- 52.245-19 Government Property Furnished "As Is."
- 52.246-1 Contractor Inspection Requirements.
- 52.246-2 Inspection of Supplies—Fixed-Price.
- 52.246-3 Inspection of Supplies—Cost-Reimbursement.
- 52.246-4 Inspection of Services—Fixed-Price.
- 52.246-5 Inspection of Services—Cost-Reimbursement.
- 52.246-6 Inspection—Time-and-Material and Labor-Hour.
- 52.246-7 Inspection of Research and Development—Fixed Price.
- 52.246-8 Inspection of Research and Development—Cost Reimbursement.
- 52.246-9 Inspection of Research and Development (Short Form).
- 52.246-10 Inspection of Facilities.
- 52.246-11 Higher-Level Contract Quality Requirement (Government Specification).

**LATE SUBMISSIONS, MODIFICATIONS, AND WITHDRAWALS OF TECHNICAL PROPOSALS UNDER TWO-STEP SEALED BIDDING (DEC 1989)**

(a) Any technical proposal under step one of two-step sealed bidding received at the office designated in this solicitation after the exact time specified for receipt will not be considered unless it is received before the invitation for bids in step two is issued and it—

(1) Was sent by registered or certified mail not later than the fifth calendar day before the date specified for receipt of technical proposals (e.g., technical proposal submitted in response to a solicitation requiring receipt of technical proposals by the 20th of the month must have been mailed by the 15th);

(2) Was sent (i) by mail, or (ii) if authorized, by telegram (including mailgram) or via facsimile, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation;

(3) Was sent by U.S. Postal Service Express Mail Next Day Service-Post Office To Addressee, not later than 5:00 P.M. at the place of mailing 2 working days prior to the date specified for receipt of technical proposals. The term “working days” excludes weekends and U.S. Federal holidays; or

(4) Is the only technical proposal received.

(b) Any modification of a technical proposal is subject to the same conditions as in paragraph (a) of this provision, except that (1) the use of a telegram (or mailgram) is authorized, and (2) if the solicitation authorizes facsimile bids, technical proposals may be modified via facsimile received at any time before the exact time set for receipt of bids under step two, subject to the conditions specified in the provision entitled “Facsimile Bids.”

(c) Technical proposals may be withdrawn by written notice or telegram (including mailgram) received at any time before the exact time set for receipt of bids under step two. If the solicitation authorizes facsimile bids, technical proposals may be withdrawn via facsimile received at any time before the exact time set for receipt of bids under step two, subject to the conditions specified in the provision entitled “Facsimile Bids.” Technical proposals may be withdrawn in person by the submitter or the submitter’s authorized representative if, before the exact time set for receipt of bids in step two, the identity of the person requesting withdrawal is established and that person signs a receipt for the technical proposal.

(d) The only acceptable evidence to establish the date of mailing of a late technical proposal, modification, or withdrawal of a technical proposal sent either by registered or certified mail is the U.S. or Canadian Postal Service postmark both on the envelope or wrapper and on the original receipt from the U.S. or Canadian Postal Service. Both postmarks must show a legible date, or the technical proposal, modification, or withdrawal of technical proposal shall be processed as if mailed late. “Postmark” means a printed, stamped, or otherwise placed impression (exclusive of a postage meter machine impression) that is readily

identifiable without further action as having been supplied and affixed by employees of the U.S. or Canadian Postal Service on the date of mailing. Therefore, submitters of technical proposals should request the postal clerk to place a legible hand cancellation bull’s-eye postmark on both the receipt and the envelope or wrapper.

(e) The only acceptable evidence to establish the time of receipt at the Government installation is the time/date stamp of that installation on the proposal wrapper or other documentary evidence of receipt maintained by the installation.

(f) The only acceptable evidence to establish the date of mailing of a late technical proposal, modification, or withdrawal sent by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee is the date entered by the post office receiving clerk on the “Express Mail Next Day Service-Post Office to Addressee” label and the postmark on the envelope or wrapper and on the original receipt from the U.S. Postal Service. “Postmark” has the same meaning as defined in paragraph (d) of this provision, excluding postmarks of the Canadian Postal Service. Therefore, submitters of technical proposals should request the postal clerk to place a legible hand cancellation bull’s-eye postmark on both the receipt and the envelope or wrapper.

(End of provision)

**52.214-24 Multiple Technical Proposals.**

As prescribed in 14.201-6(s), insert the following provision:

**MULTIPLE TECHNICAL PROPOSALS (APR 1984)**

In the first step of this two-step acquisition, solicited sources are encouraged to submit multiple technical proposals presenting different basic approaches. Each technical proposal submitted will be separately evaluated and the submitter will be notified as to its acceptability.

(End of provision)

(R 7-2003.36 1974 APR)

(R 1-2.502-1(a)(10))

**52.214-25 Step Two of Two-Step Sealed Bidding.**

As prescribed in 14.201-6(t), insert the following provision:

**STEP TWO OF TWO-STEP SEALED BIDDING (APR 1985)**

(a) This invitation for bids is issued to initiate step two of two-step sealed bidding under Subpart 14.5 of the Federal Acquisition Regulation.

(b) The only bids that the Contracting Officer may consider for award of a contract are those received from bidders that have submitted acceptable technical proposals in step one of this acquisition under . . . . . [the Contracting Officer shall insert the identification of the step-one request for technical proposals].

(c) Any bidder that has submitted multiple technical proposals in step one of this acquisition may submit a separate bid on each technical proposal that was determined to be acceptable to the Government.

(End of provision)

**52.214-26 Audit—Sealed Bidding.**

As prescribed in 14.201-7(a), insert the following clause:

**AUDIT—SEALED BIDDING (APR 1985)**

(a) *Cost or pricing data.* If the Contractor has submitted cost or pricing data in connection with the pricing of any modification to this contract, unless the pricing was based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation, the Contracting Officer or a representative who is an employee of the Government shall have the right to examine and audit all books, records, documents, and other data of the Contractor (including computations and projections) related to negotiating, pricing or performing the modification, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data. In the case of pricing any modification, the Comptroller General of the United States or a representative who is an employee of the Government shall have the same rights.

(b) *Availability.* The Contractor shall make available at its office at all reasonable times the materials described in paragraph (a) above, for examination, audit, or reproduction, until 3 years after final payment under this contract, or for any other period specified in Subpart 4.7 of the Federal Acquisition Regulation (FAR). FAR Subpart 4.7, Contractor Records Retention, in effect on the date of this contract, is incorporated by reference in its entirety and made a part of this contract.

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement.

(2) Records pertaining to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to the performance of this contract shall be made available until disposition of such appeals, litigation, or claims.

(c) The Contractor shall insert a clause containing all the provisions of this clause, including this paragraph (c), in all subcontracts over \$10,000 under this contract, altering the clause only as necessary to identify properly the contracting parties and the contracting office under the Government prime contract.

(End of clause)

**52.214-27 Price Reduction for Defective Cost or Pricing Data—Modifications—Sealed Bidding.**

As prescribed in 14.201-7(b), insert the following clause:

**PRICE REDUCTION FOR DEFECTIVE COST OR  
PRICING DATA—MODIFICATIONS—  
SEALED BIDDING (DEC 1991)**

(a) This clause shall become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, of more than \$100,000, or for the Department of Defense, the

National Aeronautics and Space Administration, and the Coast Guard, more than \$500,000, except that this clause does not apply to any modification for which the price is—

- (1) Based on adequate price competition;
- (2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or
- (3) Set by law or regulation.

(b) If any price, including profit, negotiated in connection with any modification under this clause, was increased by any significant amount because (1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price shall be reduced accordingly and the contract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) above.

(c) Any reduction in the contract price under paragraph (b) above due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective cost or pricing data.

(d)(1) If the Contracting Officer determines under paragraph (b) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense:

(i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted.

(ii) The Contracting Officer should have known that the cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer.

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract.

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2)(i) Except as prohibited by subdivision (d)(2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts



## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.214-30

shall be allowed against the amount of a contract price reduction if—

(A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested; and

(B) The Contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) and that the data were not submitted before such date.

(ii) An offset shall not be allowed if—

(A) The understated data was known by the Contractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or

(B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the date of agreement on price.

(e) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States at the time such overpayment is repaid—

(1) Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and

(2) For Department of Defense contracts only, a penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted cost or pricing data which were incomplete, inaccurate, or noncurrent.

(End of clause)

#### 52.214-28 Subcontractor Cost or Pricing Data—Modifications—Sealed Bidding.

As prescribed in 14.201-7(c), insert the following clause in solicitations and contracts:

##### SUBCONTRACTOR COST OR PRICING DATA—MODIFICATIONS—SEALED BIDDING (DEC 1991)

(a) The requirements of paragraphs (b) and (c) of this clause shall (1) become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed \$500,000, and (2) be limited to such modifications.

(b) Before awarding any subcontract expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed \$500,000 when entered

into, or pricing any subcontract modification involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed \$500,000, the Contractor shall require the subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless the price is—

(1) Based on adequate price competition;

(2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or

(3) Set by law or regulation.

(c) The Contractor shall require the subcontractor to certify in substantially the form prescribed in subsection 15.804-4 of the Federal Acquisition Regulation that, to the best of its knowledge and belief, the data submitted under paragraph (b) above were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that exceeds \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, in each subcontract that exceeds \$500,000 when entered into.

(End of clause)

#### 52.214-29 Order of Precedence—Sealed Bidding.

As prescribed in 14.201-7(d), insert the following clause:

##### ORDER OF PRECEDENCE—SEALED BIDDING (JAN 1986)

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications.

(End of clause)

#### 52.214-30 Annual Representations and Certifications—Sealed Bidding.

As prescribed in 14.201-6(u), insert the following provision:

##### ANNUAL REPRESENTATIONS AND CERTIFICATIONS—SEALED BIDDING (DEC 1989)

The bidder certifies that annual representations and certifications (check the appropriate block):

☐ (a) Dated \_\_\_\_\_ (insert date of signature of submission), which are incorporated herein by reference, have been submitted to the contracting office issuing this solicitation and that the submittal is current, accurate, and complete as of the date of this bid, except as follows (insert changes that affect only this solicitation; if "none," so state):

☐ (b) Are enclosed.

(End of provision)

**52.214-31 Facsimile Bids.**

As prescribed in 14.201-6(w), insert the following provision:

**FACSIMILE BIDS (DEC 1989)**

(a) Definition. "Facsimile bid," as used in this solicitation, means a bid, modification of a bid, or withdrawal of a bid that is transmitted to and received by the Government via electronic equipment that communicates and reproduces both printed and handwritten material.

(b) Bidders may submit facsimile bids as responses to this solicitation. These responses must arrive at the place and by the time, specified in the solicitation.

(c) Facsimile bids that fail to furnish required representations or information or that reject any of the terms, conditions, and provisions of the solicitation may be excluded from consideration.

(d) Facsimile bids must contain the required signatures.

(e) The Government reserves the right to make award solely on the facsimile bid. However, if requested to do so by the Contracting Officer, the apparently successful bidder agrees to promptly submit the complete original signed bid.

(f) Facsimile receiving data and compatibility characteristics are as follows:

(1) Telephone number of receiving facsimile equipment:

(2) Compatibility characteristics of receiving facsimile equipment (e.g., make and model number, receiving speed, communications protocol):

(g) If the bidder chooses to transmit a facsimile bid, the Government will not be responsible for any failure attributable to the transmission or receipt of the facsimile bid including, but not limited to, the following:

(1) Receipt of garbled or incomplete bid.

(2) Availability or condition of the receiving facsimile equipment.

(3) Incompatibility between the sending and receiving equipment.

(4) Delay in transmission or receipt of bid.

(5) Failure of the bidder to properly identify the bid.

(6) Illegibility of bid.

(7) Security of bid data.

(End of provision)

**52.214-32 Late Submissions, Modifications, and Withdrawals of Bids (Overseas).**

As prescribed in 14.201-6(c)(4), insert the following provision:

**LATE SUBMISSIONS, MODIFICATIONS, AND WITHDRAWALS OF BIDS (OVERSEAS)  
(DEC 1989)**

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it was sent by mail or, if authorized by the solicitation,

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was sent by telegram or via facsimile, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

(b) Any modification or withdrawal of a bid is subject to the same conditions as in paragraph (a) of this provision.

(c) The only acceptable evidence to establish the time of receipt at the Government installation is the time/date stamp of that installation on the bid wrapper or other documentary evidence of receipt maintained by the installation.

(d) Notwithstanding paragraph (a) of this provision, a late modification of an otherwise successful bid that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

(e) Bids may be withdrawn by written notice or telegram (including mailgram) received at any time before the exact time set for receipt of bids. If the solicitation authorizes facsimile bids, bids may be withdrawn via facsimile received at any time before the exact time set for receipt of bids, subject to the conditions specified in the provision entitled "Facsimile Bids." A bid may be withdrawn in person by a bidder or its authorized representative if, before the exact time set for receipt of bids, the identity of the person requesting withdrawal is established and that person signs a receipt for the bid.

(End of provision)

**52.214-33 Late Submissions, Modifications, and Withdrawals of Technical Proposals under Two-Step Sealed Bidding (Overseas).**

As prescribed in 14.201-6(v), insert the following provision:

**LATE SUBMISSIONS, MODIFICATIONS, AND WITHDRAWALS OF TECHNICAL PROPOSALS UNDER TWO-STEP SEALED BIDDING (OVERSEAS)**

(DEC 1989)

(a) Any technical proposal under step one of two-step sealed bidding received at the office designated in this solicitation after the exact time specified for receipt will not be considered unless it is received before the invitation for bids in step two is issued and it—

(1) Was sent (i) by mail, or (ii) if authorized by the solicitation, was sent by telegram (including mailgram) or via facsimile, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or

(2) Is the only technical proposal received.

(b) Any modification of a technical proposal is subject to the same conditions as in paragraph (a) of this provision, except that (1) the use of a telegram (or mailgram) is authorized, and (2) if the solicitation authorizes facsimile bids, technical proposals may be modified via facsimile received at any time before the exact time set for receipt of bids under step two, subject to the conditions specified in the provision entitled "Facsimile Bids."

(c) Technical proposals may be withdrawn by written

**52.215-21 Changes or Additions to Make-or-Buy Program.**

As prescribed in 15.708, insert the following clause in solicitations and contracts when it is contemplated that a make-or-buy program will be incorporated in the contract:

**CHANGES OR ADDITIONS TO MAKE-OR-BUY PROGRAM (APR 1984)**

(a) The Contractor shall perform in accordance with the make-or-buy program incorporated in this contract. If the Contractor proposes to change the program, the Contractor shall, reasonably in advance of the proposed change, (1) notify the Contracting Officer in writing and (2) submit justification in sufficient detail to permit evaluation. Changes in the place of performance of any "make" items in the program are subject to this requirement.

(b) For items deferred at the time of negotiation of this contract for later addition to the program, the Contractor shall, at the earliest possible time, (1) notify the Contracting Officer of each proposed addition and (2) provide justification in sufficient detail to permit evaluation.

(c) Modification of the make-or-buy program to incorporate proposed changes or additions shall be effective upon the Contractor's receipt of the Contracting Officer's written approval.

(End of clause)

(R 7-204.20(a) 1967 APR)

(R 1-3.902-3)

*Alternate I* (APR 1984). If a less economical "make" or "buy" categorization is selected for one or more items of significant value when a fixed-price incentive contract is contemplated, add the following paragraph (d) to the basic clause:

(d) If the Contractor desires to reverse the categorization of "make" or "buy" for any item or items designated in the contract as subject to this paragraph, it shall (1) support its proposal with cost or pricing data to permit evaluation and (2), after approval is granted, promptly negotiate with the Contracting Officer an equitable reduction in the contract price in accordance with paragraph (k) of the Incentive Price Revision—Firm Target clause or paragraph (m) of the Incentive Price Revision—Successive Targets clause of this contract.

(R 7-204.20(b) 1967 APR)

*Alternate II* (APR 1984). If a less economical "make" or "buy" categorization is selected for one or more items of significant value when a cost-plus-incentive-fee contract is contemplated, add the following paragraph (d) to the basic clause:

(d) If the Contractor desires to reverse the categorization of "make" or "buy" for any item or items designated in the contract as subject to this paragraph, it shall (1) support its proposal with cost or pricing data to permit evaluation and (2), after approval is granted, promptly negotiate with the Contracting Officer an equitable reduction in the contract's total estimated cost and fee in accordance with paragraph (e) of the Incentive Fee clause.

(R 7-204.20(b) 1967 APR)

**52.215-22 Price Reduction for Defective Cost or Pricing Data.**

As prescribed in 15.804-8(a), insert the following clause:  
**PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (JAN 1991)**

(a) If any price, including profit or fee, negotiated in connection with this contract, or any cost reimbursable under this contract, was increased by any significant amount because (1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction.

(b) Any reduction in the contract price under paragraph (a) above due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; *provided*, that the actual subcontract price was not itself affected by defective cost or pricing data.

(c)(1) If the Contracting Officer determines under paragraph (a) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense:

(i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted.

(ii) The Contracting Officer should have known that the cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer.

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract.

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2)(i) Except as prohibited by subdivision (c)(2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts shall be allowed against the amount of a contract price reduction if—

(A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested; and

(B) The Contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) and that the data were not submitted before such date.

(ii) An offset shall not be allowed if—

(A) The understated data was known by the Contractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or

(B) The Government proves that the facts demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the date of agreement on price.

(d) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States at the time such overpayment is repaid—

(1) Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and

(2) For Department of Defense contracts only, a penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted cost or pricing data which were incomplete, inaccurate, or non-current.

(End of clause)

#### 52.215-23 Price Reduction for Defective Cost or Pricing Data—Modifications.

As prescribed in 15.804-8(b), insert the following clause:  
PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA—MODIFICATIONS (DEC 1991)

(a) This clause shall become operative only for any modification to this contract involving a pricing adjustment expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed \$500,000, except that this clause does not apply to any modification for which the price is—

(1) Based on adequate price competition;

(2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or

(3) Set by law or regulation.

(b) If any price, including profit or fee, negotiated in connection with any modification under this clause, or any cost reimbursable under this contract, was increased by any significant amount because (1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that

were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) of this clause.

(c) Any reduction in the contract price under paragraph (b) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; *provided*, that the actual subcontract price was not itself affected by defective cost or pricing data.

(d)(1) If the Contracting Officer determines under paragraph (b) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense:

(i) The Contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position and thus the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted.

(ii) The Contracting Officer should have known that the cost or pricing data in issue were defective even though the Contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer.

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract.

(iv) The Contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data.

(2)(i) Except as prohibited by subdivision (d)(2)(ii) of this clause, an offset in an amount determined appropriate by the Contracting Officer based upon the facts shall be allowed against the amount of a contract price reduction if—

(A) The Contractor certifies to the Contracting Officer that, to the best of the Contractor's knowledge and belief, the Contractor is entitled to the offset in the amount requested; and

(B) The Contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) and that the data were not submitted before such date.

(ii) An offset shall not be allowed if—

(A) The understated data was known by the Contractor to be understated when the Certificate of Current Cost or Pricing Data was signed; or

(B) The Government proves that the facts

demonstrate that the contract price would not have increased in the amount to be offset even if the available data had been submitted before the date of agreement on price.

(e) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States at the time such overpayment is repaid—

(1) Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective for each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2); and

(2) For Department of Defense contracts only, a penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted cost or pricing data which were incomplete, inaccurate, or non-current.

(End of clause)

#### 52.215-24 Subcontractor Cost or Pricing Data.

As prescribed in 15.804-8(c), insert the following clause:

##### SUBCONTRACTOR COST OR PRICING DATA (DEC 1991)

(a) Before awarding any subcontract expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed \$500,000, when entered into, or before pricing any subcontract modification involving a pricing adjustment expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed \$500,000, the Contractor shall require the subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless the price is—

(1) Based on adequate price competition;

(2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or

(3) Set by law or regulation.

(b) The Contractor shall require the subcontractor to certify in substantially the form prescribed in subsection 15.804-4 of the Federal Acquisition Regulation (FAR) that, to the best of its knowledge and belief, the data submitted under paragraph (a) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(c) In each subcontract that exceeds \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, in each subcontract that exceeds \$500,000, when entered into, the Contractor shall insert either—

(1) The substance of this clause, including this paragraph (c), if paragraph (a) of this clause requires submission of cost or pricing data for the subcontract; or

(2) The substance of the clause at FAR 52.215-25, Subcontractor Cost or Pricing Data—Modifications.

(End of clause)

#### 52.215-25 Subcontractor Cost or Pricing Data—Modifications.

As prescribed in 15.804-8(d), insert the following clause:

##### SUBCONTRACTOR COST OR PRICING DATA— MODIFICATIONS (DEC 1991)

(a) The requirements of paragraphs (b) and (c) of this clause shall (1) become operative only for any modification to this contract involving a pricing adjustment expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed \$500,000; and (2) be limited to such modifications.

(b) Before awarding any subcontract expected to exceed \$100,000, or \$500,000 for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, when entered into, or pricing any subcontract modification involving a pricing adjustment expected to exceed \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, expected to exceed \$500,000, the Contractor shall require the subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless the price is—

(1) Based on adequate price competition;

(2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or

(3) Set by law or regulation.

(c) The Contractor shall require the subcontractor to certify in substantially the form prescribed in subsection 15.804-4 of the Federal Acquisition Regulation (FAR) that, to the best of its knowledge and belief, the data submitted under paragraph (b) of this clause were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that exceeds \$100,000, or for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, in each subcontract that exceeds \$500,000, when entered into.

(End of clause)

#### 52.215-26 Integrity of Unit Prices.

As prescribed in 15.812-2, insert the following clause:

##### INTEGRITY OF UNIT PRICES (APR 1991)

(a) Any proposal submitted for the negotiation of prices for items of supplies shall distribute costs within contracts on a basis that ensures that unit prices are in proportion to the items' base cost (e.g., manufacturing or acquisition costs). Any method of distributing costs to line items that distorts unit prices shall not be used. For example, distributing costs equally among line items is not acceptable except when

## 52.215-27

there is little or no variation in base cost. Nothing in this paragraph requires submission of cost or pricing data not otherwise required by law or regulation.

(b) The requirement in paragraph (a) of this clause does not apply to any contract or subcontract item of supply for which the unit price is, or is based on, an established catalog or market price for a commercial item sold in substantial quantities to the general public. A price is based on a catalog or market price only if the item being purchased is sufficiently similar to the catalog or market price commercial item to ensure that any difference in price can be identified and justified without resort to cost analysis.

(c) The Offeror/Contractor shall also identify those supplies which it will not manufacture or to which it will not contribute significant value when requested by the Contracting Officer. The information shall not be required for commercial items sold in substantial quantities to the general public when the price is, or is based on, established catalog or market prices.

(d) The Contractor shall insert the substance of this clause, less paragraph (c), in all subcontracts.

(End of clause)

*Alternate I (APR 1991).* As prescribed in 15.812-2(b), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The Offeror/Contractor shall also identify those supplies which it will not manufacture or to which it will not contribute significant value. This information is not required for commercial items sold in substantial quantities to the general public when the price is, or is based on, established catalog or market prices.

#### 52.215-27 Termination of Defined Benefit Pension Plans.

As prescribed in 15.804-8(e), insert the following clause:

##### TERMINATION OF DEFINED BENEFIT PENSION PLANS (SEP 1989)

The Contractor shall promptly notify the Contracting Officer in writing when it determines that it will terminate a defined benefit pension plan or otherwise recapture such pension fund assets. If pension fund assets revert to the Contractor or are constructively received by it under a termination or otherwise, the Contractor shall make a refund or give a credit to the Government for its equitable share as required by FAR 31.205-6(j)(4). The Contractor shall include the substance of this clause in all subcontracts under this contract which meet the applicability requirement of FAR 15.804-8(e).

(End of clause)

#### 52.215-28 Reserved.

#### 52.215-29 Reserved.

#### 52.215-30 Facilities Capital Cost of Money.

As prescribed in 15.904(a), insert the following provision:

#### 52-50 (FAC 90-10)

### FEDERAL ACQUISITION REGULATION (FAR)

#### FACILITIES CAPITAL COST OF MONEY (SEP 1987)

(a) Facilities capital cost of money will be an allowable cost under the contemplated contract, if the criteria for allowability in subparagraph 31.205-10(a)(2) of the Federal Acquisition Regulation are met. One of the allowability criteria requires the prospective contractor to propose facilities capital cost of money in its offer.

(b) If the prospective Contractor does not propose this cost, the resulting contract will include the clause Waiver of Facilities Capital Cost of Money.

(End of provision)

#### 52.215-31 Waiver of Facilities Capital Cost of Money.

As prescribed in 15.904(b), insert the following clause:  
WAIVER OF FACILITIES CAPITAL COST OF MONEY  
(SEP 1987)

The Contractor did not include facilities capital cost of money as a proposed cost of this contract. Therefore, it is an unallowable cost under this contract.

(End of clause)

#### 52.215-32 Certification of Commercial Pricing for Parts or Components.

As prescribed in 15.813-7(a), insert the following clause:

##### CERTIFICATION OF COMMERCIAL PRICING FOR PARTS OR COMPONENTS (AUG 1991)

###### (a) Definitions.

"Lowest commercial price," as used in this clause, means the lowest price at which a sale was made to the general public of a particular part or component. The term does not include the price at which a sale was made to—

- (1) Any agency of the United States;
- (2) Customers located outside the United States; or
- (3) A subsidiary, affiliate, or parent business organization of the contractor, or any other branch of the same business entity.

"Part or component," as used in this clause, means any individual part, component, subassembly, assembly or subsystem integral to a major system, and other property which may be replaced during the service life of the system, and includes spare parts and replenishment spare parts, but does not include packaging or labeling associated with shipment or identification of a part or component.

(b) *Submission requirements.* The Offeror/Contractor shall execute and submit to the Contracting Officer the following certificate with any offer/proposal as required by FAR 15.813-4 when requested by the Contracting Officer:

##### CERTIFICATE OF COMMERCIAL PRICING FOR PARTS OR COMPONENTS

(1) Unless justified in subparagraph (b)(2) of this clause, by submission of this offer/proposal, the Offeror/Contractor certifies that, to the best of its knowledge and belief, the prices offered for those parts or components (whether or not separately identified)

(FAR)), or (2) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed. The term includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed that of the product itself. It does not include service contracts as such.

“Domestic end product,” as used in this clause, means (1) an unmanufactured end product mined or produced in the United States, or (2) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. A component shall also be considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind (i) determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality, or (ii) to which the agency head concerned has determined that it would be inconsistent with the public interest to apply the restrictions of the Buy American Act.

“End products,” as used in this clause, means those articles, materials, and supplies to be acquired under this contract for public use.

“Foreign end product,” as used in this clause, means an end product other than a domestic end product.

(b) The Contracting Officer has determined that the Trade Agreements Act applies to this acquisition. Unless otherwise specified, the Act applies to all items in the schedule. The Contractor agrees to deliver under this contract only domestic end products unless, in its offer, it specifies delivery of foreign end products in the provision entitled “Buy American Act—Trade Agreements Act—Balance of Payments Program Certificate.” An offer certifying that a designated country end product or a Caribbean Basin country end product will be supplied requires the Contractor to supply a designated country end product or a Caribbean Basin country end product or, at the Contractor's option, a domestic end product. Contractors may not supply a foreign end product for line items subject to the Trade Agreements Act unless the foreign end product is a designated country end product or a Caribbean Basin country end product (see FAR 25.401), or unless a waiver is granted under section 302 of the Trade Agreements Act of 1979 (see FAR 25.402(c)).

(c) Offers will be evaluated in accordance with the policies and procedures of Subpart 25.4 of the FAR.

(End of clause)

#### 52.225-10 Duty-Free Entry.

As prescribed in 25.605(a), insert the following clause in solicitations and contracts over \$100,000 that provide for, or anticipate furnishing to the Government, supplies to be imported into the customs territory of the United States. As prescribed in 25.605(b), the clause may be used in contracts of \$100,000 or less if such action is consistent with the policy in 25.602. When used in contracts of \$100,000 or less, paragraphs (b)(1) and (i)(2) shall be modified to reduce the dollar figure.

#### DUTY-FREE ENTRY (APR 1984)

(a) Except as otherwise approved by the Contracting Officer, no amount is or will be included in the contract price for any duties on supplies specifically identified in the Schedule to be accorded duty-free entry.

(b) Except for supplies listed in the Schedule to be accorded duty-free entry, and except as provided under any other clause of this contract or in paragraph (c) below, the following procedures apply:

(1) The Contractor shall notify the Contracting Officer in writing of any purchase of foreign supplies (including, without limitation, raw materials, components, and intermediate assemblies) in excess of \$10,000 that are to be imported into the customs territory of the United States for delivery to the Government or for incorporation into end items to be delivered under this contract. The notice shall be furnished to the Contracting Officer at least 20 days before the importation and shall identify (i) the foreign supplies, (ii) the estimated amount of duty, and (iii) the country of origin.

(2) If the Contracting Officer determines that these supplies should be entered duty-free, the Contracting Officer shall notify the Contractor within 10 days.

(3) Except as otherwise approved by the Contracting Officer, the contract price shall be reduced by (or the allowable cost shall not include) the amount of duty that would be payable if the supplies were not entered duty-free.

(c) Paragraph (b) above shall not apply to purchases of foreign supplies if (1) they are identical in nature with items purchased by the Contractor or any subcontractor in connection with its commercial business and (2) segregation of these supplies to ensure use only on Government contracts containing duty-free entry provisions is not economical or feasible.

(d) The Contractor warrants that all supplies for which duty-free entry is to be claimed are intended to be delivered to the Government or incorporated into the end items to be delivered under this contract, and that duty shall be paid to the extent that these supplies, or any portion of them, are diverted to non-Governmental use, other than as scrap or salvage or as a result of a competitive sale authorized by the Contracting Officer.

(e) The Government agrees to execute any required duty-free entry certificates for items specified in this con-



tract or approved by the Contracting Officer and to assist the Contractor in obtaining duty-free entry of the supplies.

(f) All shipping documents covering the supplies to be entered duty-free shall consign the shipments to the contracting agency in care of the Contractor and shall include the delivery address of the Contractor (or contracting agency, if appropriate). The documents shall bear the following information:

- (1) Government prime contract number.
- (2) Identification of carrier.

(3) The notation "UNITED STATES GOVERNMENT, ..... [agency] ....., Duty-free entry to be claimed pursuant to Item No(s) ..... [from Tariff Schedules] ....., Tariff Schedules of the United States (19 U.S.C. 1202). Upon arrival of shipment at port of entry, District Director of Customs, please release shipment under 19 CFR 142 and notify ..... [cognizant contract administration office] ..... for execution of Customs Forms 7501 and 7501-A and any required duty-free entry certificates."

(4) Gross weight in pounds (if freight is based on space tonnage, state cubic feet in addition to gross shipping weight).

(5) Estimated value in United States dollars.

(g) The Contractor agrees to instruct the foreign supplier to consign the shipment as specified in (f) above, to mark all packages with the words "UNITED STATES GOVERNMENT" and the title of the contracting agency, and to accompany the shipment with at least two copies of the bill of lading (or other shipping document) for use by the District Director of Customs at the port of entry.

(h) The Contractor agrees to notify in writing the cognizant contract administration office immediately upon notification from the Contracting Officer that duty-free entry will be accorded (or, if the duty-free supplies were listed in the contract Schedule, upon award by the Contractor to the overseas supplier). The notice shall identify (1) the foreign supplies, (2) the country of origin, (3) the contract number, and (4) the scheduled delivery date(s).

(i) The Contractor agrees to insert the substance of this clause in any subcontract under which—

(1) There will be imported into the customs territory of the United States supplies identified in the Schedule as supplies to be accorded duty-free entry; or

(2) Other foreign supplies in excess of \$10,000 may be imported into the customs territory of the United States.

(End of clause)

(R 7-104.31(a) 1971 FEB)

(R 7-104.31(b) 1971 FEB)

(R 7-2003.49 1965 DEC)

#### 52.225-11 Restrictions on Certain Foreign Purchases.

As prescribed in 25.704, insert the following clause in solicitations and contracts:

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#### RESTRICTIONS ON CERTAIN FOREIGN PURCHASES (APR 1991)

(a) "Parastatal organization", as used in this clause, means a corporation, partnership, or entity owned, controlled, or subsidized by the Government of South Africa. It does not include a corporation, partnership, or entity which previously received start up assistance from the South African Industrial Development Corporation but which is now privately owned and which is not owned, controlled, or subsidized by the Government of South Africa.

(b) Unless advance written approval of the Contracting Officer is obtained, the Contractor shall not acquire for use in the performance of this contract—

(1) Any supplies or services originating from sources within the communist areas of North Korea, Vietnam, Cambodia, or Cuba;

(2) Any supplies that are or were located in or transported from or through North Korea, Vietnam, Cambodia, or Cuba;

(3) Arms, ammunition, or military vehicles produced in South Africa, or manufacturing data for such articles; or

(4) Supplies or services from the South African Government or parastatal organizations of South Africa.

(c) The Contractor shall not acquire for use in the performance of this contract supplies or services originating from sources within Iraq, any supplies that are or were located in or transported from or through Iraq, or any supplies or services from entities controlled by the Government of Iraq.

(d) The Contractor agrees to insert the provisions of this clause, including this paragraph (d), in all subcontracts hereunder.

(End of clause)

52.225-12 Reserved.

52.225-13 Reserved.

#### 52.225-14 Inconsistency Between English Version and Translation of Contract.

As prescribed at 25.902, insert the following clause:  
INCONSISTENCY BETWEEN ENGLISH VERSION  
AND TRANSLATION OF CONTRACT (AUG 1989)

In the event of inconsistency between any terms of this contract and any translation thereof into another language, the English language meaning shall control.

(End of clause)

52.226 Reserved.

#### 52.226-1 Utilization of Indian Organizations and Indian-Owned Economic Enterprises.

As prescribed in 26.104, insert the following clause:



# UTILIZATION OF INDIAN ORGANIZATIONS AND INDIAN-OWNED ECONOMIC ENTERPRISES

(AUG 1991)

(a) This clause applies only if the contract includes a subcontracting plan incorporated under the terms of the clause entitled, Small Business and Small Disadvantaged Business Subcontracting Plan. It does not apply to contracts awarded based on a subcontracting plan submitted and approved under paragraph (g) of the clause at 52.219-9.

(b) Definitions. As used in this clause:

"Indian organization" means the governing body of any Indian tribe (as defined by 25 U.S.C. 1452(c)) or entity established or recognized by the governing body for the purposes of 25 U.S.C., chapter 17.

"Indian-owned economic enterprise" means any Indian-owned (as determined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit, provided that Indian ownership shall constitute not less than 51 percent of the enterprise.

(c) The Contractor agrees to use its best efforts to give Indian organizations and Indian-owned economic enterprises the (25 U.S.C. 1544) maximum practicable opportunity to participate in the subcontracts it awards to the fullest extent consistent with efficient performance of its contract.

(1) The Contractor may rely on the written representation of the Indian organization or Indian-owned economic enterprise.

(2) If the cost of subcontracting with an Indian organization or Indian-owned economic enterprise exceeds the cost of acquiring the supplies or services from a non-Indian source, the Contractor may request an adjustment to the following:

- (i) The estimated cost of a cost-type contract;
- (ii) The target cost of a cost-plus-incentive-fee prime contract;
- (iii) The target cost and ceiling price of a fixed-price incentive prime contract; or
- (iv) The price of a firm-fixed-price prime contract.

(3) The amount of the equitable adjustment to the prime contract shall be the lesser of—

- (i) The difference between the estimated cost, target cost or firm-fixed-price included in the subcontract initially awarded to the Indian organization or enterprise and the corresponding estimated cost, target cost or firm-fixed-price which would have been included in a subcontract with the otherwise low, non-Indian offeror; or
- (ii) Five percent of the estimated cost, target cost or firm-fixed-price included in the subcontract initially awarded to the Indian organization or enterprise.

(4) The Contractor has the burden of proving the amount claimed and must assert its request for an adjustment prior to completion of contract performance.

(d) The Contracting Officer shall decide the amount of the adjustment and modify the contract accordingly. The

Contracting Officer's decision is final and not subject to the Disputes clause of this contract.

(End of clause).

## 52.227-1 Authorization and Consent.

As prescribed at 27.201-2(a), insert the following clause:

### AUTHORIZATION AND CONSENT (APR 1984)

(a) The Government authorizes and consents to all use and manufacture, in performing this contract or any subcontract at any tier, of any invention described in and covered by a United States patent (1) embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract or (2) used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with (i) specifications or written provisions forming a part of this contract or (ii) specific written instructions given by the Contracting Officer directing the manner of performance. The entire liability to the Government for infringement of a patent of the United States shall be determined solely by the provisions of the indemnity clause, if any, included in this contract or any subcontract hereunder (including any lower-tier subcontract), and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

(b) The Contractor agrees to include, and require inclusion of, this clause, suitably modified to identify the parties, in all subcontracts at any tier for supplies or services (including construction, architect-engineer services, and materials, supplies, models, samples, and design or testing services expected to exceed \$25,000); however, omission of this clause from any subcontract, under or over \$25,000, does not affect this authorization and consent.

(End of clause)

(R 7-103.22 1961 JAN)

*Alternate I* (APR 1984). The following is substituted for paragraph (a) of the clause:

(a) The Government authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this contract or any subcontract at any tier.

(R 7-302.21 1964 MAR)

*Alternate II* (APR 1984). The following is substituted for paragraph (a) of the clause:

(a) The Government authorizes and consents to all use and manufacture in the performance of any order at any tier or subcontract at any tier placed under this contract for communication services and facilities for which rates, charges, and tariffs are *not* established by a government regulatory body, of any invention described in and covered by a United States patent (1) embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract or (2) used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with

(FAC 90-10) 52-119

specifications or written provisions forming a part of this contract or with specific written instructions given by the Contracting Officer directing the manner of performance.

(R 7-1702.5(a) 1971 APR)

#### 52.227-2 Notice and Assistance Regarding Patent and Copyright Infringement.

As prescribed at 27.202-2, insert the following clause:

##### NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT (APR 1984)

(a) The Contractor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this contract of which the Contractor has knowledge.

(b) In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed under this contract, the Contractor shall furnish to the Government, when requested by the Contracting Officer, all evidence and information in possession of the Contractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except where the Contractor has agreed to indemnify the Government.

(c) The Contractor agrees to include, and require inclusion of, this clause in all subcontracts at any tier for supplies or services (including construction and architect-engineer subcontracts and those for material, supplies, models, samples, or design or testing services) expected to exceed the dollar amount set forth in 13.000 of the Federal Acquisition Regulation (FAR).

(End of clause)

(R 7-103.23 1965 JAN)

#### 52.227-3 Patent Indemnity.

Insert the following clause as prescribed at 27.203-1(b), 27.203-2(a), or 27.203-4(a)(2) as applicable:

##### PATENT INDEMNITY (APR 1984)

(a) The Contractor shall indemnify the Government and its officers, agents, and employees against liability, including costs, for infringement of any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. 181) arising out of the manufacture or delivery of supplies, the performance of services, or the construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this contract, or out of the use or disposal by or for the account of the Government of such supplies or construction work.

(b) This indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringe-

ment and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in its defense. Further, this indemnity shall not apply to (1) an infringement resulting from compliance with specific written instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract not normally used by the Contractor, (2) an infringement resulting from addition to or change in supplies or components furnished or construction work performed that was made subsequent to delivery or performance, or (3) a claimed infringement that is unreasonably settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction.

(End of clause)

(R 7-104.5 1975 JUN)

*Alternate I* (APR 1984). The following paragraph (c) is added to the clause:

(c) This patent indemnification shall not apply to the following items:

*[Contracting Officer list and/or identify the items to be excluded from this indemnity.]*

(R 7-104.5(a) 1964 SEP)

*Alternate II* (APR 1984). The following paragraph (c) is added to the clause:

(c) This patent indemnification shall cover the following items:

*[List and/or identify the items to be included under this indemnity.]*

(R 7-104.5(a) 1964 SEP)

*Alternate III* (APR 1991). The following paragraph is added to the clause:

( ) As to subcontracts at any tier for communication service, this clause shall apply only to individual communication service authorizations over \$25,000 issued under this contract and covering those communications services and facilities (1) that are or have been sold or offered for sale by the Contractor to the public, (2) that can be provided over commercially available equipment, or (3) that involve relatively minor modifications.

#### 52.227-4 Patent Indemnity—Construction Contracts.

As prescribed at 27.203-5, insert the following clause:

##### PATENT INDEMNITY—CONSTRUCTION CONTRACTS (APR 1984)

Except as otherwise provided, the Contractor agrees to indemnify the Government and its officers, agents, and employees against liability, including costs and expenses, for infringement upon any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. 181) arising out of performing this contract or out of

the use or disposal by or for the account of the Government of supplies furnished or work performed under this contract.

(End of clause)

(R 7-602.16 1964 JUN)

*Alternate I* (APR 1984). Designate the first paragraph as paragraph (a) and add the following to the basic clause as paragraph (b):

(b) This patent indemnification shall not apply to the following items:

*[Contracting Officer specifically identify the item to be excluded.]*

(R 7-602.16(b) 1966 APR)

NOTE: Exclusion from indemnity of specified, identified patents, as distinguished from items, is the exclusive prerogative of the agency head or designee (see 27.203-6).

#### 52.227-5 Waiver of Indemnity.

As prescribed at 27.203-6, insert the following clause:

WAIVER OF INDEMNITY (APR 1984)

Any provision or clause of this contract to the contrary notwithstanding, the Government hereby authorizes and consents to the use and manufacture, solely in performing this contract, of any invention covered by the United States patents identified below and waives indemnification by the Contractor with respect to such patents:

*[Contracting Officer identify the patents by number or by other means if more appropriate.]*

(End of clause)

(AV 7-104.5(b) 1955 JAN)

#### 52.227-6 Royalty Information.

As prescribed at 27.204-2, insert the following provision:

ROYALTY INFORMATION (APR 1984)

(a) *Cost or charges for royalties.* When the response to this solicitation contains costs or charges for royalties totaling more than \$250, the following information shall be included in the response relating to each separate item of royalty or license fee:

- (1) Name and address of licensor.
- (2) Date of license agreement.
- (3) Patent numbers, patent application serial numbers, or other basis on which the royalty is payable.
- (4) Brief description, including any part or model numbers of each contract item or component on which the royalty is payable.
- (5) Percentage or dollar rate of royalty per unit.
- (6) Unit price of contract item.
- (7) Number of units.
- (8) Total dollar amount of royalties.

(b) *Copies of current licenses.* In addition, if specifically requested by the Contracting Officer before execution of the contract, the offeror shall furnish a copy of the current

license agreement and an identification of applicable claims of specific patents.

(End of provision)

(R 7-2003.42 1961 AUG)

*Alternate I* (APR 1984). Substitute the following for the introductory portion of paragraph (a) of the basic clause:

When the response to this solicitation covers charges for special construction or special assembly that contain costs or charges for royalties totaling more than \$250, the following information shall be included in the response relating to each separate item of royalty or license fee:

(R 7-1710.12)

#### 52.227-7 Patents—Notice of Government Licensee.

As prescribed at 27.204-3(c), insert the following provision:

PATENTS—NOTICE OF GOVERNMENT LICENSEE

(APR 1984)

The Government is obligated to pay a royalty applicable to the proposed acquisition because of a license agreement between the Government and the patent owner. The patent number is \_\_\_\_ *[Contracting Officer fill in]*, and the royalty rate is \_\_\_\_ *[Contracting Officer fill in]*. If the offeror is the owner of, or a licensee under, the patent, indicate below:

☐ Owner

☐ Licensee

If an offeror does not indicate that it is the owner or a licensee of the patent, its offer will be evaluated by adding thereto an amount equal to the royalty.

(End of provision)

(R 7-2003.15 1974 APR)

#### 52.227-8 Reserved.

#### 52.227-9 Refund of Royalties.

As prescribed at 27.206-2, insert the following clause: In solicitations and contracts with an incentive fee arrangement, change "price" to "target cost and target profit" wherever it appears:

REFUND OF ROYALTIES (APR 1984)

(a) The contract price includes certain amounts for royalties payable by the Contractor or subcontractors or both, which amounts have been reported to the Contracting Officer.

(b) The term "royalties" as used in this clause refers to any costs or charges in the nature of royalties, license fees, patent or license amortization costs, or the like, for the use of or for rights in patents and patent applications in connection with performing this contract or any sub-contract hereunder.

(c) The Contractor shall furnish to the Contracting Officer, before final payment under this contract, a statement of royalties paid or required to be paid in connection

with performing this contract and subcontracts hereunder together with the reasons.

(d) The Contractor will be compensated for royalties reported under paragraph (c) of this clause, only to the extent that such royalties were included in the contract price and are determined by the Contracting Officer to be properly chargeable to the Government and allocable to the contract. To the extent that any royalties that are included in the contract price are not in fact paid by the Contractor or are determined by the Contracting Officer not to be properly chargeable to the Government and allocable to the contract, the contract price shall be reduced. Repayment or credit to the Government shall be made as the Contracting Officer directs.

(e) If, at any time within 3 years after final payment under this contract, the Contractor for any reason is relieved in whole or in part from the payment of the royalties included in the final contract price as adjusted pursuant to paragraph (d) of this clause, the Contractor shall promptly notify the Contracting Officer of that fact and shall reimburse the Government in a corresponding amount.

(f) The substance of this clause, including this paragraph (f), shall be included in any subcontract in which the amount of royalties reported during negotiation of the subcontract exceeds \$250.

(End of clause)

(V 7-104.8(b) 1968 FEB)

#### **52.227-10 Filing of Patent Applications—Classified Subject Matter.**

As prescribed at 27.207-2, insert the following clause:

##### **FILING OF PATENT APPLICATIONS—**

##### **CLASSIFIED SUBJECT MATTER (APR 1984)**

(a) Before filing or causing to be filed a patent application in the United States disclosing any subject matter of this contract classified "Secret" or higher, the Contractor shall, citing the 30-day provision below, transmit the proposed application to the Contracting Officer. The

Government shall determine whether, for reasons of national security, the application should be placed under an order of secrecy, sealed in accordance with the provision of 35 U.S.C. 181-188, or the issuance of a patent otherwise delayed under pertinent United States statutes or regulations. The Contractor shall observe any instructions of the Contracting Officer regarding the manner of delivery of the patent application to the United States Patent Office, but the Contractor shall not be denied the right to file the application. If the Contracting Officer shall not have given any such instructions within 30 days from the date of mailing or other transmittal of the proposed application, the Contractor may file the application.

(b) Before filing a patent application in the United States disclosing any subject matter of this contract classified "Confidential," the Contractor shall furnish to the Contracting Officer a copy of the application for Government determination whether, for reasons of national security, the application should be placed under an order of secrecy or the issuance of a patent should be otherwise delayed under pertinent United States statutes or regulations.

(c) Where the subject matter of this contract is classified for reasons of security, the Contractor shall not file, or cause to be filed, in any country other than in the United States as provided in paragraphs (a) and (b) of this clause, an application or registration for a patent containing any of the subject matter of this contract without first obtaining written approval of the Contracting Officer.

(d) When filing any patent application coming within the scope of this clause, the Contractor shall observe all applicable security regulations covering the transmission of classified subject matter and shall promptly furnish to the Contracting Officer the serial number, filing date, and name of the country of any such application. When transmitting the application to the United States Patent Office, the Contractor shall by separate letter identify by agency and number the contract or contracts that require security classification markings to be placed on the application.

(4) If the Contractor is a new enrollee to the ACH system, a "Payment Information Form," SF 3881, must be completed before payment can be processed.

(c) In the event the Contractor, during the performance of this contract, elects to designate a different financial institution for the receipt of any payment made using electronic funds transfer procedures, notification of such change and the required information specified above must be received by the appropriate Government official 30 days prior to the date such change is to become effective.

(d) The documents furnishing the information required in this clause must be dated and contain the signature, title, and telephone number of the Contractor official authorized to provide it, as well as the Contractor's name and contract number.

(e) Contractor failure to properly designate a financial institution or to provide appropriate payee bank account information may delay payments of amounts otherwise properly due.

(End of clause)

#### 52.233-1 Disputes.

As prescribed in 33.215, insert the following clause:  
DISPUTES (DEC 1991)

(a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$50,000 is not a claim under the Act until certified as required by subparagraph (d)(2) below. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2) For Contractor claims exceeding \$50,000, the Contractor shall submit with the claim a certification that—

- (i) The claim is made in good faith;
- (ii) Supporting data are accurate and complete to the best of the Contractor's knowledge and belief;

and

(iii) The amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable.

(3)(i) If the Contractor is an individual, the certification shall be executed by that individual.

(ii) If the Contractor is not an individual, the certification shall be executed by—

(A) A senior company official in charge at the Contractor's plant or location involved; or

(B) An officer or general partner of the Contractor having overall responsibility for the conduct of the Contractor's affairs.

(e) For Contractor claims of \$50,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over \$50,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) At the time a claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative means of dispute resolution. When using alternate dispute resolution procedures, any claim, regardless of amount, shall be accompanied by the certification described in paragraph (d)(2) of this clause, and executed in accordance with paragraph (d)(3) of this clause.

(h) The Government shall pay interest on the amount found due and unpaid from (1) the date the Contracting Officer receives the claim (properly certified if required), or (2) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

(End of clause)

*Alternate I* (DEC 1991). If it is determined under agency procedures, that continued performance is necessary pending resolution of any claim arising under or relating to the contract, substitute the following paragraph (i) for the paragraph (i) of the basic clause:

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or

relating to the contract, and comply with any decision of the Contracting Officer.

(AV 7-103.12(h) 1980 JUN)

### 52.233-2 Service of Protest.

As prescribed in 33.106, insert the following provision:  
SERVICE OF PROTEST (NOV 1988)

(a) Protests, as defined in section 33.101 of the Federal Acquisition Regulation, that are filed directly with an agency, and copies of any protests that are filed with the General Accounting Office (GAO) or the General Services Administration Board of Contract Appeals (GSBCA), shall be served on the Contracting Officer (addressed as follows) by obtaining written and dated acknowledgment of receipt from .....

*[Contracting Officer designate the official or location where a protest may be served on the Contracting Officer.]*

(b) The copy of any protest shall be received in the office designated above on the same day a protest is filed with the GSBCA or within one day of filing a protest with the GAO.

(End of provision)

### 52.233-3 Protest after Award.

As prescribed in 33.106(b), insert the following clause:  
PROTEST AFTER AWARD (AUG 1989)

(a) Upon receipt of a notice of protest (as defined in 33.101 of the FAR) the Contracting Officer may, by written order to the Contractor, direct the Contractor to stop performance of the work called for by this contract. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Upon receipt of the final decision in the protest, the Contracting Officer shall either—

(1) Cancel the stop-work order; or

(2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.

(b) If a stop-work order issued under this clause is canceled either before or after a final decision in the protest, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if—

(1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and

(2) The Contractor asserts its right to an adjustment within 30 days after the end of the period of work stoppage; *provided*, that if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon a proposal at any time before final payment under this contract.

(c) If a stop-work order is not canceled and the work

covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.

(d) If a stop-work order is not canceled and the work covered by the order is terminated for default, the Contracting Officer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop-work order.

(e) The Government's rights to terminate this contract at any time are not affected by action taken under this clause.

(End of clause)

*Alternate 1* (JUN 1985). As prescribed in 33.106(b), substitute in paragraph (a)(2) the words "the Termination clause of this contract" for the words "the Default, or the Termination for Convenience of the Government clause of this contract." In paragraph (b) substitute the words "an equitable adjustment in the delivery schedule, the estimated cost, the fee, or a combination thereof, and in any other terms of the contract that may be affected" for the words "an equitable adjustment in the delivery schedule or contract price, or both."

### 52.234 Reserved.

### 52.235 Reserved.

### 52.236-1 Performance of Work by the Contractor.

As prescribed in 36.501(b), insert the following clause in solicitations and contracts when a fixed-price construction contract is contemplated and the contract amount is expected to exceed \$1,000,000. The Contracting Officer may insert the clause in solicitations and contracts when a fixed-price construction contract is contemplated and the contract amount is expected to be \$1,000,000 or less. Complete the clause by inserting the appropriate percentage consistent with the complexity and magnitude of the work and customary or necessary specialty subcontracting (see 36.501(a)).

#### PERFORMANCE OF WORK BY THE CONTRACTOR (APR 1984)

The Contractor shall perform on the site, and with its own organization, work equivalent to at least .....[insert the appropriate number in words followed by numerals in parentheses] percent of the total amount of work to be performed under the contract. This percentage may be reduced by a supplemental agreement to this contract if, during performing the work, the Contractor requests a reduction and the Contracting Officer determines that the reduction would be to the advantage of the Government.

(End of clause)

(R 7-603.15 1965 JAN)

(R 1-18.104)

### 52.236-2 Differing Site Conditions.

As prescribed in 36.502, insert the following clause in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or

Provision or Clause	Prescribed In	P or C	IBR	UCF	Principle Type and/or Purpose of Contract																	UTL		
					FP SUP	CR SUP	FP R&D	CR R&D	FP SVC	CR SVC	FP CON	CR CON	CR T&M	LH	LMV	SVC	COM	DDR	A-E	FAC	IND DEL		TRN	SP
52.223-1 Clean Air and Water Certification.	23.105(a)	P	No	K	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
52.223-2 Clean Air and Water.	23.105(b)	C	Yes	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
52.223-3 Hazardous Material Identification and Material Safety Data.	23.303	C	Yes	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
52.223-4 Recovered Material Certification.	23.405	P	Yes	K	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
52.223-5 Certification Regarding A Drug-Free Workplace.	23.505(a)	P	Yes	K	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
52.223-6 Drug-Free Workplace.	23.505(c)	C	Yes	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
52.223-7 Notice of Radioactive Materials.	23.602	C	No	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
52.224-1 Privacy Act Notification.	24.104(a)	C	Yes	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
52.224-2 Privacy Act.	24.104(b)	C	Yes	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
52.225-1 Buy American Certificate.	25.109(a)	P	No	K	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
52.225-2 Waiver of Buy American Act for Civil Aircraft and Related Articles.	25.109(c)	P	Yes	L	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
52.225-3 Buy American Act—Supplies.	25.109(d)	C	Yes	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
52.225-4 Reserved.																								
52.225-5 Buy American Act—Construction Materials.	25.205	C	Yes	—						A	A													
52.225-6 Balance of Payments Program Certificate.	25.305(a)	P	No	K	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
52.225-7 Balance of Payments Program.	25.305(c)	C	Yes	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A
52.225-8 Buy American Act—Trade Agreements Act—Balance of Payments Program Certificate.	25.407(a)(1)	P	No	K	A	A														A				
52.225-9 Buy American Act—Trade Agreements Act—Balance of Payments Program.	25.407(a)(2)	C	Yes	I	A	A															A			
52.225-10 Duty-Free Entry.	25.605(a)	C	Yes	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A

Provision or Clause	Prescribed In	P or C	IBR	UCF	Principle Type and/or Purpose of Contract																			
					FP SUP	CR SUP	FP R&D	CR R&D	FP SVC	CR SVC	FP CON	CR CON	T&M LH	COM LMV	SVC	DDR	A-E	FAC	IND DEL	TRN	SP	UTL SVC		
52.225-11 Restrictions on Certain Foreign Purchases.	25.704	C	Yes	I	A	A	A	A	A	A	A	A	A	A	A					A			A	
52.225-12 Reserved.		P																						
52.225-13 Reserved.		C																						
52.225-14 Inconsistency Between English Version and Translation of Contract.	25.902	C	Yes	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	
52.226-1 Utilization of Indian Organizations and Indian-Owned Economic Enterprises.	26.104	C	Yes	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	
52.227-1 Authorization and Consent.	27.201-2(a)	C	Yes	I	A	A				A	A	A	A											
Alternate I	27.201-2(b)	C	Yes	I			A	A			A	A											O	
Alternate II	27.201-2(c)	C	Yes	I			A				A	A												
52.227-2 Notice and Assistance Regarding Patent and Copyright Infringement.	27.202-2	C	Yes	I	A	A	A	A	A	A		A								A				
52.227-3 Patent Indemnity.	27.203-1(b) 27.203-2(a) 27.203-4(a)(2)	C	Yes	I	A	A				A	A													
Alternate I	27.203-2(b)	C	Yes	I	A	A				A	A													
Alternate II	27.203-2(b)	C	Yes	I	A	A				A	A									A				
Alternate III	27.203-2(c)	C	Yes	I																		A		
52.227-4 Patent Indemnity—Construction Contracts.	27.203-5	C	Yes	—							A	A												
Alternate I	27.203-5	C	Yes	—							O	O												
52.227-5 Waiver of Indemnity.	27.203-6	C	Yes	I	A	A	A	A	A	A	A	A								A	A			
52.227-6 Royalty Information.	27.204-2	P	No	K	A	A	A	A	A	A	A	A								A	A			
Alternate I	27.204-2	P	No	K																A				
52.227-7 Patents—Notice of Government Licensee.	27.204-3(c)	P	No	K	A	A	A	A	A	A	A	A												